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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 14

MORRIS SCHOENTHAL AND FANNIE R. SCHOENTHAL, PETITIONERS,

vs.

IRVING TRUST CO., AS TRUSTEE IN BANKRUPTCY OF LEONARD H. SMITH, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 5, 1932

CERTIORARI GRANTED APRIL 11, 1932

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(36,581)

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Morris Schoenthal and Fannie R. Schoenthal,
Appellants,

against

Irving Trust Co., as Trustee in Bankruptcy of Leonard H. Smith, Trading as Faultless Sweater Mills, Bankrupt, Appellee, and Hyman Smith, Defendant.

Petition for Appeal and Order Allowing Same

The above named appellants conceiving themselves aggrieved by the judgment entered in the office of the Clerk of the United States District Court, for the Southern District of New York, on the 3rd day of March, 1931, directing judgment in favor of the appellee against the appellant Morris Schoenthal in the sum of $538.74 and against the appellant Fannie R. Schoenthal in the sum of $1,075.84, do hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors filed herewith, and the said petitioners further pray that their appeal may be allowed, and that a transcript of the record and proceedings and the papers upon which said judgment was entered duly authenticated may be sent to the United States Circuit Court of Appeals, for the Second Circuit, and that said appeal shall operate as a supersedeas, and that an order be made herein fixing the amount of security [fol. 2] to be furnished by the appellants at the sum of $2,000.00, and that upon the filing of a bond for the said sum, all further proceedings in this Court shall be stayed until the filing of the judgment and order of the United States Circuit Court of Appeals, for the Second Circuit.

Dated New York, March 18th, 1931.

Yours, &c., Martin Perlmutter, Attorney and Solicitor for Appellants, 305 Broadway, Manhattan Borough, New York City.

The above entitled petition for leave having been duly filed, it is

Ordered that the appeal be allowed as prayed for, and that upon the filing by the said appellants of a Surety Company bond in the sum of $2,000.00, with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas of the judgment mentioned in said petition, and entered in this action, and shall suspend and stay all further proceedings in this Court until the filing of the judgment of the United States Circuit Court of Appeals, for the Second Circuit, and it is

Further ordered that the term of this Court be and it is extended until such date as the judgment of the United States Circuit Court of Appeals, for the Second Circuit shall be filed in this Court.

Dated New York, March 23rd, 1931.

Frank J. Coleman, District Judge.

[fol. 3] IN UNITED STATES DISTRICT COURT

SUBPŒNA

The President of the United States of America to Morris Schoenthal, Fannie R. Schoenthal, and Hyman Smith, Greetings:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in equity, by Irving Trust Company, as Trustee in Bankruptcy of Leonard H. Smith, trading as Faultless Sweater Mills, Bankrupt, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you of Two hundred and fifty Dollars ($250).

Witness, Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, on the 22nd day of September in the year One thousand nine hundred and thirty and of the Independence of the United States the One hundred and fifty-fifth.

Charles Weiser, Clerk. Krause & Hirsch, Sol'rs.

The defendants are required to file their answer or other defense in the above cause in the Clerk's office on or before

the twentieth day after service hereof excluding the day of said service, otherwise the bill aforesaid may be taken Pro Confesso.

Charles Weiser, Clerk.

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Leonard H. Smith, Trading as Faultless Sweater Mills Bankrupt, Plaintiff,

against

MORRIS SCHOENTHAL, FANNIE R. SCHOENTHAL, and HYMAN SMITH, Defendants

BILL OF COMPLAINT

Plaintiff, above named, complaining of the defendants above named, by its attorneys, Krause & Hirsch, respectfully shows to this Court and alleges upon information and belief:

For a first cause of action against Morris Schoenthal:

First. That this is a suit in equity, brought by the plaintiff, as Trustee in Bankruptcy of Leonard H. Smith, trading as Fautless Sweater Mills, bankrupt, under and by virtue of the provisions of the Bankruptcy Act of 1898, and the amendments thereto, to recover a preference under §60b of the said Act.

Second. That on or about the 10th day of July, 1930, an involuntary petition in bankruptcy was duly filed by three creditors of the bankrupt herein in the United States [fol. 5] District Court, for the Southern District of New York, praying that he be adjudicated a bankrupt, and that thereafter in the said proceeding, on the 23rd day of July, 1930, an order was duly made in the said Court, adjudicating the said Leonard H. Smith, trading as Faultless Sweater Mills, a bankrupt.

Third. That at all the times hereinafter mentioned, the plaintiff, Irving Trust Company, was a domestic corporation, organized and existing under and by virtue of the

laws of the State of New York, engaged in the banking and trust business.

Fourth. That at a first meeting of creditors of the said Leonard H. Smith, trading as Faultless Sweater Mills, duly held on the 5th day of September, 1930, before Hon. Harold P. Coffin, Referee in Bankruptcy, in charge of said proceeding, the plaintiff was duly elected Trustee in Bankruptcy of the said bankrupt estate, and that plaintiff duly qualified thereafter and has continued to act and is now acting as such Trustee.

Fifth. That within four months prior to the date of the filing of the said involuntary petition in bankruptcy, while insolvent and indebted to the defendant and divers other creditors of the same class, upon unsecured indebtedness, provable in bankruptcy, and well knowing such insolvency, the said bankrupt did, within four months prior, as aforesaid, and on or about the 9th day of June, 1930, make a transfer of his property to the defendant Morris Schoenthal by paying to him the sum of $500.00.

Sixth. That the effect of the said payment by the said bankrupt to the said defendant was to enable the said de-
[fol. 6] fendant to obtain a greater percentage of his debt than any other creditor of the said bankrupt of the same class as defendant and that the said payment did thus operate as a preference under the provisions of the Bankruptcy Act of 1898 and the amendments thereto.

Seventh. That the said defendant received the said payment knowing or having reasonable cause to believe that he was receiving a preference in violation of the provisions of the Bankruptcy Act.

Eighth. That the plaintiff has insufficient assets in its hands to pay for the debts of the said bankrupt.

Ninth. That the plaintiff has duly demanded of the said defendant the restoration and return of the said preferential payment, but that said payment has been refused.

Tenth. That the plaintiff has no adequate remedy at law.

And for a first cause of action against Fannie R. Schoenthal:

Eleventh. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs designated

"First", "Second", "Third", "Fourth", "Sixth", "Seventh", "Eighth", "Ninth", and "Tenth" of this complaint, with the same force and effect as if set forth herein at length.

Twelfth. That within four months prior to the date of the filing of the said involuntary petition in bankruptcy, while insolvent and indebted to the defendant and divers [fol 7] other creditors of the same class, upon unsecured indebtedness, provable in bankruptcy, and well knowing such insolvency, the said bankrupt did, within four months prior, as aforesaid, and on or about and between the 11th day of June, 1930, and the 19th day of June, 1930, make a transfer of his property to the de*de*fendant Fannie R. Schoenthal, by paying to her the sum of $1,000.00.

And for a first cause of action against Hyman Smith:

Thirteenth. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs designated "First", "Second", "Third", "Fourth", "Sixth", "Seventh," "Eighth", "Ninth" and "Tenth" of this complaint with the same force and effect as if set forth herein at length.

Fourteenth. That within four months prior to the date of the filing of the said involuntary petition in bankruptcy, while insolvent and indebted to the defendant and divers other creditors of the same class, upon unsecured indebtedness, provable in bankruptcy, and well knowing such insolvency, the said bankrupt did, within four months prior, as aforesaid, and on or about and between the 24th day of June, 1930, and the 30th day of June, 1930, make a transfer of his property to the defendant Hyman Smith by paying to him the sum of $800.00.

Wherefore plaintiff demands a decree and judgment against the defendants above named declaring the transfers above set forth to be preferential and void and in violation of the provisions of the Bankruptcy Act of 1898, and the amendments thereto, and that a decree be entered [fol. 8] directing the said defendants to account to and pay over to the plaintiff herein the sums found by this Court to have been paid over in violation of the provisions of the Act above set forth, together with interest from the dates

of the said payments, and the costs and disbursements of this action, and that plaintiff have such other and further relief as to the Court may seem just and equitable, and that subpœnas issue from this Court, directed to the said defendants, commanding them on a day certain to appear and answer the complaint herein and to abide by the orders and decrees of this Court.

Krause & Hirsch, Solicitors for Plaintiff, 225 Broadway, Borough of Manhattan, City of New York.

(Verified Sept. 19, 1930.)

[fol. 9] In United States District Court

[Title omitted]

Answer of Defendant Fannie R. Schoenthal

Defendant, Fannie R. Shoenthal, sued herein as Fannie R. Schoenthal, answering the complaint herein, by Maurice Letteau, her attorney, respectfully shows to this Court and alleges:

First. Denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs marked "First," "Fourth," "Eighth" and "Tenth" of plaintiff's first cause of action against Fannie R. Schoenthal.

Second. Denies each and every allegation contained in Paragraphs marked "Sixth," "Seventh," "Ninth" and "Twelfth" of plaintiff's first cause of action against Fannie R. Schoenthal.

Wherefore defendant, Fannie R. Schoenthal, demands a decree and judgment against the plaintiff herein dismissing the complaint herein, together with costs.

Maurice Letteau, Solicitor for Defendant Fannie R. Schoenthal. Office & P. O. address: 305 Broadway, Borough of Manhattan, City of New York.

(Verified Oct. 27, 1930.)

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT MORRIS SCHOENTHAL

Defendant, Morris Shoenthal, sued herein as Morris Schoenthal, answering the complaint herein by Maurice Letteau his attorney, respectfully shows to the Court and alleges:

First. Denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs marked "First," "Fourth," "Eighth" and "Tenth" of plaintiff's first cause of action against Morris Schoenthal.

Second. Denies each and every allegation contained in Paragraphs marked "Fifth," "Sixth," "Seventh" and "Ninth" of plaintiff's first cause of action against Morris Schoenthal.

Wherefore defendant, Morris Schoenthal, demands a decree and judgment against the plaintiff herein dismissing the complaint herein, together with costs.

Maurice Letteau, Solicitor for Defendant Morris Schoenthal. Office & P. O. address: 305 Broadway, Borough of Manhattan, City of New York.

(Verified Oct. 27, 1930.)

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION SUBSTITUTING ATTORNEY

It is hereby stipulated and agreed that Martin Perlmutter, Esq., with offices at #305 Broadway, in the Borough of Manhattan, City of New York, be and he hereby is substituted as and for attorney and solicitor for the defendants Morris Schoenthal and Fannie R. Schoenthal in place and in stead of Maurice Letteau, Esq.

Dated New York, February 11th, 1931.

Maurice Letteau, Attorney for Defendants. Morris Schoenthal, Defendant in Person. Fannie R. Schoenthal, Defendant in Person.

(Duly acknowledged.)

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR JURY TRIAL

SIRS: Please take notice, that on the annexed petition of Morris Schoenthal, verified the 13th day of February, 1931, and upon the bill of complaint and answer herein and upon all the proceedings, the undersigned will move the above-named Court, at a Motion Term thereof, to be held at the Court House, in the Old Post Office Building, at room 235 thereof, on the 17th day of February, 1931, at 10:30 A. M. or as soon thereafter as counsel can be heard, for an order pursuant to Equity Rule 22 directing that the action herein be transferred from the equity side of the above-named Court to the law side of the above-named Court, and that said case herein be conducted as a common law action, and/or in the alternative, that an order be made and entered herein directing that the trial of the above-entitled action be held before a jury in the same manner as would an [fol. 13] action at common law, and that the defendants be accorded a trial of the above-entitled action by a jury in accordance with the common law, and for such other and further relief as may be just and proper in the premises.

Dated New York, February 13th, 1931.

Yours, &c., Martin Perlmutter, Attorney and Solicitor for the Defendants, 305 Broadway, Manhattan Borough, New York City.

To Krause & Hirsch, Esqs., Attorneys for Plaintiff, 225 Broadway, Manhattan Borough, New York City.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR JURY TRIAL

To the Judge of the District Court of the United States for the Southern District of New York:

The petition of Morris Schoenthal respectfully shows to this Court and alleges:

I am one of the defendants in this action and make this petition in support of an application to transfer the above-entitled action to the law side of the above-named Court, or, in the alternative for an order granting to the defendants a trial of the above-entitled action by a jury under the common law of the United States of America as guaranteed by the 7th Amendment to the Constitution of the United States.

The other defendant herein who has been served, to wit, Fannie R. Schoenthal, joins in this petition, but is unable to sign an application therefor by reason of the fact that she is now confined to her home by illness. The defendant, Hyman Smith, has not been served.

[fol. 15] The action is brought to recover two alleged preferences, one against the defendant Morris Schoenthal in the sum of $500.00, and the other against the defendant Fannie R. Schoenthal in the sum of $1,000.00 claimed to have been made by payments of monies given by the bankrupt to said defendants in payment of loans due to said defendants from the bankrupt.

The action herein is clearly nothing more than an action to recover a money judgment against Morris Schoenthal and Fannie R. Schoenthal respectively for the sums of $500.00 and $1,000.00, and the third cause of action against Hyman Smith, who has not been served, is also for the recovery of a money judgment in the sum of $800.00. Each of the causes of action herein represents a definite stated amount, for which the plaintiff has an adequate remedy at law.

The petition of the defendants herein respectfully prays that they be accorded a trial by a jury either by transferring this case to the law docket, for the trial of common law cases, or in the alternative for the impanelling of a jury on the equity side of the Court and that the trial thereupon proceed in the same manner as a common law action to recover monies would be conducted. This last suggestion is not to be deemed a waiver of the common law right to a jury trial, but is made solely in order to expedite the proceedings herein, the demand for a jury trial being made as a constitutional right under the Constitution and the Laws of Congress.

Furthermore, the petitioners respectfully state to the Court that since the plaintiff has an adequate remedy at

law, to wit, an action to recover the sum of $1,500.00, which the plaintiff claims was received by the defendants as a preference, equity should not entertain this case and under the provisions of Equity Rule 22, now Section 723 of Title [fol. 16] 28 of the United States Code Annotated, the said action should be transferred to the law side. This section provides as follows:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleading as shall be essential."

Furthermore Rule 23 provides as follows:

"Suits in Equity shall not be sustained in either of the Courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

The Trustee in this case has a plain, adequate and complete remedy at law, for all that he seeks is a judgment for the recovery of a stated sum of money with respect to which it is wholly unnecessary to invoke any equity jurisdiction. The result of bringing this action in equity is only to deprive defendants of their constitutional right to a jury and for that reason this case should be transferred to the law side of the Court as a common law case with a jury trial, or, in the alternative, it is suggested that a jury be impanelled in this case in order to save time, but that the action proceeded as a regular jury trial to recover a specified sum of money.

The Court is respectfully requested to grant the petition herein and to grant the defendants herein a trial by jury either by transferring the above-entitled action to the law side of the Court, or to impanel a jury for a common law trial.

Dated New York, February 11th, 1931.

Morris Schoenthal, Petitioner.

(Verified Feb. 11, 1931.)

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING DEFENDANTS' MOTION FOR JURY TRIAL

The defendants Morris Schoenthal and Fannie R. Schoenthal having duly moved the above named Court for an order transferring the above entitled action to the Law side of the Court, and granting the defendants a trial by jury, and the said motion having duly come on to be heard before a Motion Term of the above named Court, before Hon. William Bondy, and the said Hon. William Bondy having duly referred the motion to the Justice above named, and the said motion having duly come on to be argued before the above named Court prior to the trial of the above entitled action, and after reading and filing the notice of [fol. 18] motion herein dated the 13th day of February, 1931, and the petition of Morris Schoenthal, dated and sworn to the 11th day of February, 1931, with proof of service thereof, upon the attorneys for the plaintiff, and after hearing Martin Perlmutter, Esq., solicitor for the defendants, by Leo Guzik, of counsel, in support of the motion, and Krause & Hirsch, solicitors for the plaintiff, by George Levin, of counsel, in opposition thereto, and due deliberation having been had,

It is on motion of Krause & Hirsch, solicitors for the plaintiff,

Ordered that the said motion of the defendants for a trial by jury, and to transfer the case to the Law side of the Court, be and the same hereby is in all respects denied.

Denied.

J. F. S., District Judge.

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

February (1931) Term

Before Honorable John Foster Symes, District Judge

New York, February 24, 1931—3:15 P. M.

Statement of Evidence

APPEARANCES

Krause & Hirsch, Solicitors for Plaintiff; George C. Levin, Counsel.

Martin Perlmutter, Solicitor for Defendant Schoenthal; Leo Guzik, Counsel.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Guzik: May I proceed, your Honor? In my previous application for an adjournment I may not have made myself clear. The facts are these: There are two defendants against whom two separate preferences are sought to be set aside. I am ready to go to trial on one of those, the defendant is present in court; the other defendant is ill.

[fol. 20] The Court: Which one is present?

Mr. Guzik: Morris Schoenthal. I am ready now to go to trial. I can not proceed on the other. I have a doctor's affidavit that this woman, if she is subjected at the present time to court proceedings, is in danger of her life. I can not even get permission from the doctor to take her deposition. He says in a month—she is now being treated—she may be able in a month to have her deposition taken. I have the doctor's affidavit, which I previously submitted to your Honor.

Mr. Levin: If your Honor please, I would be the last one to want to jeopardize the woman's life for a fifteen hundred dollar claim; I, on the other hand, do not want to go ahead on the matter piecemeal. The trustee asks for a recovery of $500.00 against this defendant; we seek a thousand dollars from the defendant who is ill; as against another we find the defendant is out of the jurisdiction be-

cause we can not effect service; there is another recovery of $800.00, although that matter is not in issue because we have not effected service.

Now, the defendants in this case knew right along, and previous to this, that the woman was precariously ill and they should have made some effort to bring her testimony before the Court. I will say this to the Court: that sometime ago, during a Twenty-One A examination I endeavored to effect service upon this woman at her home address and I was told it was impossible to do so—I do not know whether it was on account of illness or some other reason. I am going to leave it to the Court and make no recommendation whatever.

I submit these facts to the Court: We are compelled to rely in these cases upon hostile witnesses and we have been met at point of trial with a motion to adjourn the action [fol. 21] and a transfer from the equity calendar to the law side. Now, there is a question of good faith, here, whether all these tactics are being adopted for the purpose of delay or actually for the purpose which the application recites.

I will say this to the Court: If this defendant is, in good faith, making this application, let him stipulate that I may use the bankrupt's testimony without calling him, without the necessity of finding him on the adjourned date. On that stipulation I will consent to this adjournment.

Mr. Guzik: No objection.

The Court: You consent but there is nothing before the Court. I would like to have a record made of the concession.

Mr. Guzik: I am perfectly willing to concede, your Honor, that we can go to trial.

Mr. Levin: I do not want to try this case piecemeal. I do not really understand the concession.

Mr. Guzik: I am perfectly willing, your Honor, to take all the testimony today, take it before your Honor, and have the case continued and then we can get this woman to court. I have no objection to that.

Mr. Levin: We have a visiting judge. We have no statement when this witness is expected to recover or when it can reasonably be anticipated she will be examined. Furthermore, there is no suggestion made of the testimony.

Mr. Guzik: If we go to trial on this preference of Morris Schoenthal——

Mr. Levin: I refuse.

Mr. Guzik: Pardon me. If I be allowed to examine the [fol. 22] bankrupt as to what transactions including the transactions with the other defendant, then his testimony can be used at the second trial. That is the stipulation you requested. I am perfectly willing to have this bankrupt's testimony used on the second trial without my privilege of cross examination.

The Court: I do not think this affidavit of the doctor is sufficient.

Mr. Guzik: We will have the doctor appear.

The Court: No; that is up to you to produce proof. And even if it were sufficient, counsel has not shown proper diligence in getting this woman's testimony or her deposition. I can not help be impressed but there is a very studied effort being made here to postpone the case. However, as long as the trustee does not insist on going ahead it will be postponed upon such terms as he names.

Mr. Guzik: Your Honor, may I say this?

The Court: I have decided the matter.

Mr. Levin: I will consent to an adjournment on condition that counsel will allow me to read in the record, without producing the bankrupt and giving him the privilege of calling, if he so requires, the testimony of the bankrupt Leonard H. Smith, taken before Honorable Harold P. Coffin, sitting as Special Commissioner, on July 31st, 1930.

Mr. Guzik: Your Honor, I have never spoken to this bankrupt. I wasn' present——

Mr. Levin: You have read the testimony.

The Court: You go to trial on both cases.

Mr. Guzik: May I say this about any studied attempts to delay, if your Honor will examine the Law Journal for Saturday, I was marked as counsel in a case on trial. I am allowing someone else to cross examine in that case for fear [fol. 23] I would be charged with delaying, not coming from that court where I was actually a witness a few minutes ago, so I think your Honor is mistaken, I respectfully submit, mistaken that I made any attempt to studiously delay the case.

The Court: I am speaking of the parties to the case. I am not speaking personally of counsel. That is the impression I have gained from having heard two or three different motions, at various times, since I have been sitting in this

court, all of them with the idea of postponing the final hearing on this action. Counsel must realize a bankruptcy preference suit, like these are, involves a preference and counsel should guide themselves accordingly.

Mr. Guzik: Your Honor, I have another motion here referred to you by Judge Bondy.

The Court: What is that?

Mr. Guzik: A motion for a jury trial, in which Judge Bondy said if the trial was not before your Honor on this calendar, he would take it up with the Circuit Judges of this Court. He read our brief on the call of the calendar. I have the briefs and motion papers here. I would like to be allowed to argue that motion now.

The Court: What did Judge Bondy decide to do?

Mr. Guzik: He referred it to you.

(Argument on the motion off the record.)

The Court: Motion denied. You may have your exception.

Mr. Guzik: The other defendant in this case is willing to defray the expenses of any physician in court.

The Court: It is too late.

Mr. Guzik: May I then move to separate the cases? I do [fol. 24] not see how they can be tried together. I move to sever the actions on the ground that there is an improper joinder; on the ground that two distinct preferences have been joined in one action; an improper joiner of causes of action and parties.

Mr. Levin: With respect to that, it has all the vices of the other motions made here today.

(Argument off the record.)

The Court: Motion denied.

Mr. Guzik: I respectfully except. Your Honor, may I now make a formal motion for adjournment of the preference action of this defendant, who is ill? Irespectfully move that these actions be severed and the trial adjourned as to the defendant, Fannie, on the ground that the said defendant is ill and cannot attend at court; on the further ground that the defendant hereby offers to have the said defendant examined by any physician designated by the Court, at the expense of said defendant, in order to ascertain the true condition of said defendant; and that defendant is willing to have the examination made at once in order to ascertain

whether the trial can proceed as to that defendant by tomorrow morning.

The Court: I do not think it is made in good faith. The affidavit of the doctor presented here is not sufficient. The Court concludes there has been no effort made to take a deposition or in any way meet the rule, this being a preference case, it is the duty of counsel to aid the Court in deciding these matters as promptly as possible. It is very clear in the opinion of the Court that all that is suggested here is delay and that if this defendant is not able to attend court the deposition should be taken or could have been taken either now or sometime since that fact became known to counsel. Motion is denied.

[fol. 25] Mr. Guzik: I respectfully except.

The Court: This case will proceed and the other matter will go over until tomorrow morning.

Mr. Guzik: May I ask your Honor to direct that the motion papers be made a part of the record?

The Court: Yes.

(Mr. Levin made an opening statement to the Court.)

(Mr. Guzik made an opening statement to the Court.)

Mr. Levin: There is no question but that these people made, in fact, loans to the company and the money was used in the business. I offer in evidence a certified copy of order approving trustee's bond.

Mr. Guzik: No objection.

(Marked Plaintiff's Exhibit 1.)

Mr. Levin: I offer in evidence from the files of this Court, produced from the office of——

Mr. Guzik: We may save some time if he will give the dates of adjudications, and I will concede that on such and such a date a petition was filed. We can save time.

The Court: Petition was filed on the 10th of July?

Mr. Guzik: I will concede that it is involuntary.

Mr. Levin: That is admitted by your answer.

Mr. Guzik: There is no use in offering — in evidence. I will admit that.

Mr. Levin: That is what I meant. I will offer in evidence from the files of this Court, produced from the office of Honorable Harold P. Coffin, Referee in Bankruptcy, in charge of this matter, the following documents, and since

[fol. 26] they are court originals, ask that they be deemed marked as exhibits: the trustee's first report of the Irving Trust Company, filed on September 23rd, 1930, indicating that the trustee has a balance on hand to the credit of the estate, in the bank of $5,097.10.

(Deemed marked in evidence as Plaintiff's Exhibit No. 2.)

Mr. Guzik: No objection.

Mr. Levin: I offer in evidence from the same file order of the Referee in Bankruptcy declaring first dividend of ten per cent, dated September 24, 1930.

Mr. Guzik: I object to that as incompetent, irrelevant and immaterial.

Mr. Levin: We have to show the estate cannot pay a hundred cents on the dollar.

Mr. Guzik: I will admit that. Without saying whether it is true or not, I will admit that.

(Deemed marked Plaintiff's Exhibit No. 3.)

Mr. Guzik: I object.

The Court: He has a right to put it in if he wants.

Mr. Guzik: Then I will withdraw my admission.

Mr. Levin: I will offer in evidence from the same file the schedules in bankruptcy of the bankrupt and ask that they be deemed marked in evidence.

Mr. Guzik: I object to it, as incompetent, irrelevant and immaterial and not binding on these defendants.

The Court: It will be admitted.

(Deemed marked Plaintiff's Exhibit No. 4.)

Mr. Guzik: I respectfully except.

Mr. Levin: Mr. Smith, please take the witness stand.

[fol. 27] Leonard H. Smith, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Levin:

Q. 1. Where do you live, Mr. Smith?

A. 17971 Grand Concourse.

Q. 2. You are the bankrupt in this case?
A. Yes.
Q. 3. Under what name did you do business?
A. Faultless Sweater Mills.
Q. 4. At what address?
A. 105 Wooster Street, New York.
Q. 5. New York City?
A. New York City.
Q. 6. In what line of business were you engaged?
A. Manufacturing sweaters.
Q. 7. No one else connected in the business with you?
A. No.
Q. 8. Is the defendant Morris Schoenthal related to you?
A. Yes.
Q. 9. What is the relationship?
A. He is a cousin.
Q. 10. Is the defendant Fannie R. Schoenthal related to you?
A. Same way.
Q. 11. What relationship is Hyman Smith to you?
A. My brother.
Q. 12. How long have you been in business,
A. Under this address?
Q. 13. Yes.
A. Ten years.
Q. 14. Throughout that time you have conducted the business yourself?
A. Yes, sir.
Q. 15. I assume that in the conduct of your business you carried a stock of merchandise and machinery and equipment?
A. Yes, sir.
Q. 16. I call your attention to the fact that the petition in bankruptcy in this case was filed July 10, 1930. Will [fol. 28] you please tell us for six months prior to that time how business had been getting on?

Mr. Guzik: I object to it as calling for a conclusion. The question is rather indefinite, how business was getting along. I don't know what he means, whether business is getting good or bad.

Q. 16. (Continued.) Was it good or bad?

Mr. Guzik: I object. It is a concept, business being good or bad, and the question is too indefinite.

The Court: I understand it is just a preliminary question and will probably be developed.

The Wtiness: Can I answer?

The Court: Yes.

A. Business was the same as with everybody in a general way.

Q. 17. Would you describe it as good or bad?

A. Well, not bad and not good.

Q. 18. From the beginning of 1930 your business had considerable net worth, is that not right?

A. I do not understand what you mean.

Q. 19. Do you know what I mean by net worth?

A. Do you mean it was worth more than I owed? Yes.

The Court: Did your assets exceed your liabilities?

The Witness: Yes.

Q. 20. Can you tell me at the beginning of 1930 what your assets and liabilities were?

A. I couldn't recollect that.

[fol. 29] Q. 21. I show you this paper and ask you to please state to the Court, if you know, what it is?

A. That is a statement of assets and liabilities, December 31st, 1928.

Q. 22. This statement is signed by whom?

A. By myself.

Q. 23. Now, at the date of this statement, will you please state to the Court what your net worth was?

Mr. Guzik: I object to that on the ground that it was 1928.

Mr. Levin: Subject to connection.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

A. My worth was $29,636.96.

Q. 24. After this statement which you have just referred to, did you issue any further financial statements?

A. No, sir.

Q. 25. Would you say that your financial condition, and I refer to that of your business, in June, 1930, was better or worse than the condition reflected by this financial statement?

Mr. Guzik: I object to it, as improper.

The Court: Objection overruled.
Mr. Guzik: I respectfully except.

(Q. 25 repeated.)

A. I really didn't know. I didn't take no inventory. I don't know how I stood. I thought business was all right.
Q. 26. Do you want this court to believe that you do not know how your business stood in June, 1930?
A. I didn't know exactly how I stand.
Q. 27. You mean that you do not remember about it?
[fol. 30] A. No, I did not know at that time.
Q. 28. Are you certain about that?
A. Positively.
Q. 29. Do you remember being examined before the Referee in Bankruptcy by me?
A. Yes.
Q. 30. Do you remember me putting to you certain questions and you making certain answers?
A. Yes.
Q. 31. Do you remember whether there was any change in market conditions during 1930?

Mr. Guzik: I object to it as incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Guzik: I respectfully except.

A. I don't remember that now.
Q. 32. You do not remember that now?
A. No.
Q. 33. See if I can refresh your recollection, reading from the examination of the witness before Referee Coffin, on July 31st, 1930:

"Q. According to this statement on December 31st, 1928, you had a net worth of $29,636.96?
"A. Yes.
"Q. Where my finger is——"

Mr. Guzik: May I interrupt? Is this being read for the record or for what purpose?
Mr. Levin: For the purpose of refreshing the witness's recollection.

Q. 33. (Continuing:)
"Q. Where my finger is (indicating)?

"A. Whatever this statement says is correct.

"Q. What happened to that net worth?

"A. There are books for that. The books will explain everything.

[fol. 31] "Q. You explain to me what happened to it in a general way.

"A. There was a decline in stock. The price of stock came down and the price of machinery came down and there was a loss in manufacturing.

"Q. What percentage drop was there in price?"

Mr. Guzik: I object to the reading of all the testimony into the record. He has not testified whether he remembered or whether he was asked these questions.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

Q. 33. (Continuing:)

"A. I couldn't tell exactly.

"Q. Have you any idea?

"A. No, my accountant could explain this matter better than I can do.

"Q. What specific merchandise dropped, in price?

"A. Everything, raw material and finished.

"Q. What do you refer to by drop in machinery, you mean depreciation?

"A. Depreciation, that you have to go and buy new machinery, and the old machinery wasn't worth anything and you paid a lot of money for that machinery."

Do you remember being asked those questions and giving those replies?

Mr. Guzik: I object to that. I will withdraw the objection.

A. I couldn't remember that.

Q. 34. Do you remember my asking you those questions and you making those replies to those questions?

A. I don't remember that. I am telling you I cannot remember what it was at that time.

Q. 35. Do you deny making those answers?

A. I don't deny, but I don't remember.

[fol. 32] Q. 36. Were these answers correct?

A. I wouldn't tell you now.

Q. 37. Do you mean to tell this court that your inventory in June, 1930 was worth just as much as it was on the financial statement which I show you?

A. I don't say exactly. It dropped a little but it didn't drop so much.

Q. 38. How much do you say it dropped?

A. I couldn't tell you exactly; couldn't state exactly what it is.

The Court: We will adjourn until tomorrow morning.

(Adjourned to February 25, 1931; 10:30 A. M.)

New York, February 25, 1931—10:30 A. M.

Trial resumed.

LEONARD H. SMITH, resumed.

Direct examination.

By Mr. Levin (continued):

Q. 39. At the close of yesterday's hearing, Mr. Smith, we were discussing the condition of your company financially on or about June, 1930. Have you thought about that?

A. Yes.

Q. 40. Now, can you tell the Court what the condition of your company was in June, 1930?

A. Well, can you state the question definitely what you mean by what condition?

Q. 41. How did your condition compare in June, 1930?

A. The way I admitted, the price of merchandise dropped [fol. 33] a little and the price of machinery depreciated, but I was always considered solvent.

The Court: Did you consider yourself as solvent?

The Witness: I consider myself solvent.

The Court: When?

The Witness: At that time.

The Court: What date?

The Witness: In June.

Q. 42. I am asking him about June, 1930.

A. June, yes, 1930.

Q. 43. When did your accountant last examine your books?

A. That was the day before I went to the creditors.

Q. 44. I suppose that was the last time you paid your accountant?

A. Well, this I don't remember.

Q. 45. When did you go to your creditors?

A. I don't remember exactly the dates. You have the dates.

Q. 46. According to your testimony before the Referee you went to your creditors June 30, 1930, and a meeting was called on July 2nd, 1930?

A. The way I recollect I was there one day before the meeting was called.

Q. 47. See if I can refresh your recollection——

Mr. Guzik: I object to any refreshing of his recollection. He says he remembers that on that day. I object to his reading these minutes into evidence.

Q. 48. Do you remember when you went to your creditors?

Mr. Guzik: I object to that. He has answered he does remember.

[fol. 34] By the Court:

Q. 49. When did you go to your creditors?

A. Well, I went to my creditors the day before the meeting was called.

Q. 50. When was the meeting called?

A. The next day. I couldn't tell you exactly the day. But I distinctly remember that.

By Mr. Levin:

Q. 51. You went to your creditors the end of June, 1930, is that right?

A. The way I said, I can not remember exactly the dates, but I am telling you it was the day before.

The Court: Was it the latter part of June or not?

The Witness: The latter part.

The Court: If you will try to co-operate here a little

better than you have, we will save time. Do not fence with counsel. Give answers freely.

The Witness: I am trying my best to answer questions.

Q. 52. The petition in bankruptcy in this case was filed on July 10th?

A. Yes, sir.

Q. 53. Does that help you fix the day when you went to your creditors?

A. About ten days before that, about eight days.

Q. 54. Prior to your going to your creditors, when did you last pay your accountant?

A. This I can't remember.

Q. 55. You paid your accountant in June, 1930, did you not?

A. Yes.

Q. 56. What did you pay your accountant for in June, 1930?

A. For taking inventory, helping me take inventory, and [fol. 35] fixing up the report for the creditors, for preparing the report.

Q. 57. Do you remember how much you paid your accountant?

A. I think I paid him a hundred dollars.

Q. 58. What is your accountant's name?

A. Mr. Blackman.

Q. 59. Has he a firm name?

A. Blum, Blackman Company.

Q. 60. I show you this check.

A. Yes.

Q. 61. To the order of Blum, Blackman Company in the sum of $100.00, and ask you if that is the check you gave your accountant?

A. Let me see. Yes.

Mr. Levin: I offer the check in evidence.

Mr. Guzik: I object to it as incompetent, irrelevant and immaterial. I do not know the purpose for which it is offered. If I am enlightened, I may withdraw my objection.

Mr. Levin: To show the surrounding circumstances in June, 1930.

The Court: Objection overruled.

Mr. Guzik: Exception.

(Marked Plaintiff's Exhibit 5.)

Q. 62. Am I right in saying that these hundred dollars were given to your accountant for preparing a report on your financial condition in June, 1930?

A. Yes.

Q. 63. And this report that your accountant prepared disclosed what?

A. The condition of the business.

Q. 64. You were speaking a few minutes ago that you thought you were solvent.

[fol. 36] A. I thought to the last day I am solvent; before I took inventory I didn't know how I stand.

Q. 65. After you took inventory what did you find out?

A. I find out that I was considering, even that day, after I took inventory, I was solvent, and I went to the creditors and asked for extension.

Q. 66. Even though you had your accountant's report you still considered yourself solvent?

A. I considered, well, I had a big stock, big merchandise made up for the fall, and June was a slow month, and I figured even though I lost a few thousand dollars, I will make it up in the season.

Q. 67. What did your creditors say about an extension?

A. They refused that.

Q. 68. Well, did you make any offer of settlement to your creditors?

A. Yes, sir.

Q. 69. What offer of settlement did you make?

A. Twenty-five per cent.

Q. 70. In other words, you offered to pay your creditors twenty-five per cent of your indebtedness to them?

A. Yes, sir.

Q. 71. I assume you considered that a fair offer?

Mr. Guzik: I object to that, if your Honor please.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

A. I considered this offer as much as I was able—I considered I was able to raise.

Q. 72. During summer months did your company do much business?

A. Well, not much. We generally do business in the fall months.

Q. 73. In other words, in June, 1930, you were approaching a very dull season?

A. Well, in June is always slow in my trade.

[fol. 37] Q. 74. That is true also of July and August?

A. Well, August the season starts.

Q. 75. The latter part of August?

A. Well, the early part of August.

Q. 76. Is it not a fact that in June, 1930, you had very little cash on hand?

A. That is true.

Q. 77. Did you have enough cash to pay your creditors?

A. No.

Q. 78. And you also had a number of past due bills, did you not, in June, 1930?

A. Yes.

Q. 79. And is it not true that a good many of your creditors were pressing you for payment?

A. Well, some used to press*ed* me, some not.

Q. 80. In June, 1930, you were indebted to a number of your relatives for loans, is that not right?

A. Yes.

Q. 81. And you made various payments during—

A. Well, I paid before, too.

Q. 82. You made various payments to them, to your relatives, in June, 1930?

A. Yes, I paid the creditors, too.

The Court: You are not asked that. Just answer the question.

Q. 83. After you paid your accountant $100.00, did you make any payments to the defendant Morris Schoenthal?

A. Well, I couldn't recollect. If you show me a check, I can tell you.

Q. 84. I ask you what this check, dated June 9, 1930, is for?

A. That is for a loan.

Q. 85. That is a repayment?

A. Repayment on a loan.

Q. 86. Of $500.00?

A. Five hundred dollars.

Q. 87. To Morris Schoenthal?
A. Yes, sir, June 9.

The Court: When was that paid?
[fol. 38] Mr. Levin: June 9, 1930. I offer this check in evidence.
Mr. Guzik: No objection.

(Marked Plaintiff's Exhibit No. 6.)

Q. 88. I show you this check of June 11, 1930, and ask you if that represents a repayment of a loan?
A. Let me see that, please?
Q. 88. (Continuing:) To Fannie Schoenthal in the amount of $500.00?
A. Yes, sir.

Mr. Levin: I offer that check in evidence.

(Marked Plaintiff's Exhibit No. 7.)

Q. 89. I show you this check of June 19, 1930, to the order of Fannie R. Schoenthal, in the amount of $500.00, and ask you if that represents a repayment of a loan to that individual?
A. Yes, sir, repayment of a loan. It is marked on the check.

Mr. Levin: I offer that check in evidence.
Mr. Guzik: No objection.

(Marked Plaintiff's Exhibit No. 8.)

The Court: What relation is she?

Q. 90. She is a cousin, is that right?
A. Cousin.
Q. 91. What is the relationship between Morris Schoenthal and Fannie R. Schoenthal?
A. Brother and sister.
Q. 92. I show you this check of June 24, 1930, to the order of Hyman Smith in the amount of $300.00, and ask you what that represents?
A. Payment of loan, repayment of loan.
[fol. 39] Q. 93. To your brother?
A. My brother.

Mr. Levin: I offer this check in evidence.
Mr. Guzik: I move to strike out the answer, and the in-

troduction of the check, on the ground that Hyman Smith is not a defendant in this case, has not been served, and it is incompetent, irrelevant and immaterial with respect to the defendants now in suit.

Mr. Levin: I am showing that in the month of June the relatives of this bankrupt were taken care of. I admit that check is not in suit because that defendant has not been served. I submit I am entitled to give the Court the circumstances for building up the complete picture.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

(Marked Plaintiff's Exhibit No. 9.)

Q. 94. Did you make any more payments to your brother?
A. Yes.

Mr. Guzik: The same objection, your Honor.

Q. 95. I show you this memorandum, and ask you if you can tell me the date and the amount of any further payments to your brother, Hyman Smith?

Mr. Guzik: I object to it, as incompetent, irrelevant and immaterial, and not binding on the defendants.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

A. June 30th.

[fol. 40] Q. 96. 1930?

A. Yes.

Q. 97. In what amount?

A. $500.00.

Q. 98. What is that slip which you hold in your hand?

A. Well, I don't know what it is. You can explain better.

Q. 99. Is that a memorandum of the bank for a certification of a check?

A. Yes, sir.

Mr. Levin: I offer the memorandum in evidence.

Mr. Guzik: Same objection, if your Honor please, and on the further ground I do not know the relevancy of the memorandum. He has testified it was paid in that amount over my objection.

The Court: It is just cumulative. If you want to have it in, you have a right to put it in.

Mr. Guzik: I respectfully except.

Mr. Levin: Just to have the record complete, your Honor.

(Marked Plaintiff's Exhibit No. 10.)

Mr. Guzik: I respectfully except.

Q. 100. In June, 1930, what were your liabilities?

A. This I couldn't tell you. You have a record there.

Q. 101. You signed and swore to the schedules in bankruptcy in this case, did you not?

A. Yes.

Q. 102. Are your schedules correct?

A. Positively.

Q. 103. I call your attention to the fact that your schedules list liabilities totaling $18,900.26?

A. That is correct.

Q. 104. Those are your liabilities. Now, do those liabili- [fol. 41] ties include the loans to your relatives which you repaid in June, 1930?

A. I don't think so. You bad better look it over.

Q. 105. You look over the list of creditors, Mr. Smith.

A. No, they don't include.

Q. 106. Altogether, how much did those loans you repaid total, do you recall?

Mr. Guzik: I will concede whatever the amount is—twenty-three hundred dollars?

Mr. Levin: Twenty-three hundred dollars is correct. Counsel concedes that the total repayments in June to relatives were $2,300.00.

The Court: How much assets does that statement show?

Mr. Levin: The schedules in bankruptcy list assets of fifteen thousand, nine hundred fifty-three dollars and eighty-eight cents.

The Court: $2,300.00 was all paid in June?

Mr. Levin; That is right.

Q. 107. According to these schedules, your principal assets consisted of machinery and tools which are listed at $9,282.15, is that right?

A. Machinery, yes.

Q. 108. And that was most of your machinery——

A. Well, various kinds bought; some were new.

Q. 109. And that is the machinery which you referred to as having depreciated in value?

A. No, not the new ones; the old ones.

Q. 110. How much of the machinery was brand new?

A. About half of it.

Q. 111. And the rest of it was how old?

A. About three or four years old.

Q. 112. I call your attention to the fact that your assets [fol. 42] include an unliquidated claim from N. Liebowitz, of $1,001.73. Who was N. Liebowitz?

A. Salesman.

(Discussion off the record.)

The Court: Do you want to stipulate that this doctor would testify in accordance with this memorandum, if it becomes material?

Mr. Levin: I will stipulate the witness, if called, would give testimony as stated in this memorandum. I object to its materiality and so forth.

Q. 113. Does that money represent overdrawals?

A. Yes, advance on commissions.

Q. 114. Did you ever make any attempts to collect that asset?

A. Well, I tried. I left it to you to collect, and many others to collect.

Q. 115. You were not able to collect it?

A. No. I tried.

Q. 116. At the time of your proposed settlement to creditors, did you have a large bank balance?

A. No.

Q. 117. Where did you expect to get the money to effect the settlement?

A. Borrow it from friends.

Q. 118. From these same relatives?

A. No, I don't say exactly from the same relatives.

Q. 119. Why was it in June, 1930, when you had considerable past due obligations you repaid your relatives in full?

Mr. Guzik: I object to that.

A. They asked me for the money.

Mr. Guzik (continuing): It is immaterial. I will withdraw it.

[fol. 43] The Court: That last part of the question——

A. (Continuing:) They asked me for the money and I wanted to get more money from these people and they said, "Pay back whatever you owe."

Q. 120. In other words, in June, 1930, you came to these relatives and asked them for more money?

A. Yes.

Q. 121. And did they say to you they wanted to know how your business stood?

A. They didn't ask me that.

Q. 122. They did not ask you that?

A. No, they only said, "Pay back whatever you owe me."

Q. 123. Are you certain, Mr. Smith, that your relatives did not ask you how your business stood?

A. No.

Q. 124. Did you not go to your relatives and tell them you were pressed for money?

A. I didn't tell them. I told them I needed money.

Q. 125. Did they not ask you why you needed money?

A. Well, they always, when I came to them, to ask for money, they never asked why I wanted it. They say, "All right," and give it to me, all the time.

Q. 126. Whenever you wanted to get money you got it?

A. Whenever I needed money they gave it to me.

Q. 127. You needed money pretty badly in June, 1930?

A. Yes, I needed it bad.

Q. 128. And instead of getting money from your relatives you gave it to them?

Mr. Guzik: I object to it as argumentative.

[fol. 44] The Court: Strike it out. That has already been covered.

Q. 129. Did you ever talk to your relatives about your financial condition?

A. Well, they used to ask me how business is. I told them I am getting along all right.

Q. 130. Did you ever have a talk with them about whether or not you were behind in your business?

A. No, I told them I am not behind.

Q. 131. Who advised you to make an assignment, to go to your creditors?

Mr. Guzik: I object to that. There is no evidence in the record of any such request.

Mr. Levin: Withdrawn.

Q. 132. Did your relatives ever make any suggestion to you that you make an assignment for your creditors?
A. Never did.

Mr. Guzik: May I ask that when counsel says relatives, he specifically point out whom, because I do not represent one of those relatives.
The Court: Just name them.

Q. 133. Did Morris Schoenthal or Fannie Schoenthal ever say to you that you ought to have an inventory taken?
A. They never told me that.
Q. 134. You realize you are under oath?
A. Positively.
Q. 135. Do you remember testifying before the Referee in Bankruptcy?
A. Yes.
Q. 136. Do you remember what your testimony was in that respect before the Referee?
A. I certainly remember.
[fol. 45] Q. 137. See if I can refresh your recollection in that respect.

Mr. Guzik: I object to that, if your Honor please, on the ground that counsel can not impeach his own witness.
The Court: I think in a situation like this, where it is the bankrupt, you can hardly say he is his witness.
Mr. Guzik: All right, I will withdraw it.

Q. 137. (Continuing:) Reading from the testimony referred to yesterday, of this witness.

Mr. Guzik: Just a minute. Are you reading that into the record? Unless counsel wishes to ask him in the form of a question whether or not it refreshes his recollection, I object.

Q. 138. Did you or did you not testify as follows before the Referee?

Mr. Guzik: I am objecting to his attempt to impeach his own witness by a roundabout method.
The Court: Objection overruled.
Mr. Guzik: Exception.

Q. 138. (Continuing:)

"Q. How is it you happened to repay all these relatives during the month of June?

"A. I paid them before that, too.

"Q. I am talking about the June payments.

"A. I saw I am short of cash money and so I went to these people and I asked them they should loan me more [fol. 46] money. They used to help me out right along, and they told me to go and take inventory and find out how I stand and I walked out and when they found out how it was they pressed me.

"Q. You told them how the inventory stood?

"A. I told them I am pressed and I don't see any way out of it.

"Q. Then you asked for more money?

"A. They wouldn't give me. I asked for money.

"Q. Why didn't they give you more money?

"A. They saw I am behind, and I wouldn't be able to pay it.

"Q. Who saw you were behind?

"A. My people.

"Q. All these people you borrowed from?

"A. My brother didn't know anything but he came up to the business and he saw how I stand and I had to pay him off.

"Q. Hyman Smith?

"A. Hyman Smith. The other people found out."

Mr. Guzik: I move to strike it out on the ground that it refers to a defendant in the case whom I do not represent.

Mr. Levin: Suppose you let me state the testimony and then you can make any objections you wish.

Q. 138. (Continuing:) Please listen to this testimony:

"The other people found out something was wrong and they didn't want to give me any more money.

"Q. They insisted on being paid?

"A. Yes.

"Q. Did you ask them to wait?

"A. No, they didn't want to. They used to come to the house, and I had to pay.

"Q. Didn't you tell them you owed to other creditors?

"A. Yes.

[fol. 47] "Q. They insisted upon getting their money?

"A. Yes, I had to do it.

"Q. At the time you had this conversation with them you had already taken inventory and found out you were considerably behind?

"A. No, I didn't have to take any inventory yet. I was questioning. I saw at that time I was behind in ready cash, and I would not be able to get cash during the summer time because my store was always fall goods, and I would not be able to continue, and that was the reason they pressed me for money.

"Q. They realized you had no capital, and with a slack season coming?

"A. Yes.

"Q. And you say these people came to your house and insisted upon getting paid?

"A. Yes.

"Q. When was that, in June?

"A. That was before I paid them.

"Q. Shortly before?

"A. Yes, they used to come often to the house and bother me that I should give them money.

"Q. Who?

"A. Mr. Schoenthal, and Fanny Schoenthal, and my brother.

"Q. Why did they suddenly come to your house?"

The Court: I do not think it is proper to read indefinitely.

Mr. Levin: I merely want to get——

The Court: It isn't fair to read to the witness fifty or sixty questions and then ask him to testify whether he remembers them. If you want to refresh him on some particular it will be all right, but that does not give you the right to put it all in by reading it.

Mr. Levin: May I read this, then?

[fol. 48] Q. 138. (Continuing:)

"A. Because I went first to their house and they did not want to give me, and they said, 'We gave you some money already, why do you want more?' And I told them the con-

dition of my business, and they said, 'You have to give an assignment.' "

Mr. Guzik: Now, I object to it, if your Honor please, on the ground it is improper questioning. Counsel has read the entire testimony and asked the witness to refresh his recollection as to many points which are not relevant to this case and I submit that it is an improper manner of putting evidence into the record. I move to strike out the entire question.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

Q. 138. (Continuing:) Now, referring to the last portion of the testmiony which I read.

The Court: Wait, he has not answered your question.

Mr. Guzik: May I also make a——

The Court: The question is, did you so testify.

Q. 139. Was that your testimony?

A. Well, some of it is and some not.

Q. 140. You say this testimony is incorrect?

A. Not all is incorrect; some of it. There is a mistake there.

Q. 141. You mean in what way?

A. You say that a relative asked me for an inventory. I never said that.

Q. 142. That is wrong?

A. The creditors asked me for the inventory.

[fol. 49] Q. 143. Anything else wrong?

A. Well, that I told them that at that time I feel that I wouldn't be able to continue. I never said that. That must be—refer to the creditors.

Q. 144. You say that is a mistake, too?

A. That is a mistake, yes.

Q. 145. Anything else?

A. Well, you ask me another question; I will tell you. I don't remember exactly what it was. You read so much here. Those are two mistakes I find there.

Q. 146. Anything else?

Mr. Guzik: I object to that. Let him ask him what is wrong specifically.

The Court: He has given him the opportunity.

Mr. Guzik: I myself don't remember.

The Court: Give him the testimony and let him look it over. If there is anything you want to correct, do so.

Q. 147. Page 15 is where I started to read (handing the testimony to the witness).

A. I want to strike out "they asked me to make—take inventory and find out how I stand." I never told you that.

The Court: Just put it, I didn't testify so and so.

A. (Continuing:) Another thing I told them, "I am pressed. I do not see any way out of it." I didn't say that. Another thing, "When they gave you more money?" "They see I am behind and I wouldn't be able to pay it." I didn't know what they saw about it. I couldn't say that.

Another thing, "The other people found out something [fol. 50] was wrong and they didn't want to give me any more money." How can I testify about what they found? I don't know.

And then they say I told them the condition of the business, and they said "you have to give an assignment." They didn't say that. And I really—I wasn't able to tell the condition of the business I did not know how I stand myself before I took inventory.

They got words and I said "Yes."

Q. 148. What page are you reading from?

A. Page 17.

Q. 149. I didn't get that far.

A. All right. Did I skip one page, or what? Maybe I skipped one page. I guess I read all.

Q. 150. Have you read all the testimony?

A. Let me see the sixteenth page. Maybe I didn't read it. Page 16. Yes, I read that.

Q. 151. Now, you started to make some suggestions with respect to page 17?

A. No.

Q. 152. Do you want me to read it? If you have any corrections, make them.

A. You said I shouldn't read 17.

Mr. Guzik: Have you read those questions to the witness before?

Mr. Levin: No.

The Witness: You didn't. What is the use? Do you want me to read it?

Q. 153. Are you objecting to going further in the testimony?

A. I don't know.

Q. 154. I don't want you to do anything.

The Court: Just a minute. He offers to do it.

The Witness: I offer to do it, if you want me.

[fol. 51] The Court: Just wait until you are asked a question.

Q. 155. Did you give these people that you paid in June promissory notes for these loans?

A. No, I did not.

Q. 156. Did you have any agreement as to when this money was to be repaid?

A. Yes, sir.

Q. 157. What was the agreement?

A. With who?

Q. 158. With Mr. Schoenthal.

A. No, the money was given to me for thirty days' time. It was past due.

The Court: When were these loans made?

The Witness: In January.

Q. 159. When did you borrow money from Mr. Schoenthal?

A. In January, 1930. I think so.

Q. 160. And this loan from Mr. Schoenthal was a short time loan?

A. Yes.

Q. 161. In other words, it was past due for some months?

A. Past due, yes.

Q. 162. When did Fanny Schoenthal lend you the thousand dollars?

A. This I couldn't tell you. You had—You have the books. You can tell me better.

Mr. Guzik: I can tell you, to save time.

Mr Levin: I will accept your statement.

Q. 163. Look at these two checks and see if they can fix the time of the loans from Fanny Schoenthal?

A. One check is January 30th, 1930, for $500.00.

Q. 164. And the other?

A. The other check, May 28th, 1930, another $500.00.

Q. 165. What arrangement did you have about the return [fol. 52] of these two loans?

A. The May—or the first check was given on sixty days time and the other check was given to be paid back in two or three days.

Q. 166. So that both these loans were past due?

A. Positively.

Q. 167. Did you do much business in June, 1930?

A. Well, the books will show you everything.

Q. 168. Can you not give the Court some approximate idea?

A. We generally don't do much business in June. June is a slow month.

Q. 169. Am I correct in saying that practically all your sales in June, 1930, were for cash?

A. No, sir.

Q. 170. Did you sell much on credit?

A. Positively I did.

Q. 171. Could you say how much?

A. I couldn't tell you. The books will show you everything.

Q. 172. What book is this which I hold in my hand?

A. Sales book.

Q. 173. All shipments for June, 1930, would be noted in this book?

A. Positively.

Mr. Levin: I offer this book in evidence.

The Court: What is the object?

Mr. Levin: I want to show that practically all the business in June was on a cash basis.

The Court: Do you admit that?

Mr. Guzik: I do not know. If counsel will let me look over the book. I never saw the book. Did you make any computations? I will assume your computations to be correct and you may offer them in evidence.

Mr. Levin: I state that practically all the sales in June with a few exceptions were for cash.

[fol. 53] The Court: Is that correct?

The Witness: Not all; some of them were cash.

The Court: With a few exceptions?

The Witness: A few exceptions, yes. A few exceptions cash. I say all on credit, few exceptions on cash, as I recollect it. I couldn't tell you exactly.

Mr. Guzik: I will concede that we have gone over the book and that most of the sales are marked C. O. D. or Net Cash.

Mr. Levin: Your witness.

The Court: That is, the sales made by the bankrupt in the month of June, 1930?

Mr. Levin: That is right.

Cross-examination.

By Mr. Guzik:

X Q. 174. Mr. Smith, this was not the first loan that had been made to you by Morris Schoenthal, was it?

A. No.

The Court: Did he make him only one loan?

Mr. Guzik: No, he made him others. I want to bring that out.

X Q. 175. On September 25, 1928, did Morris Schoenthal lend you a thousand dollars?

A. I don't remember the date.

X Q. 176. I show you this check and ask you whether that is a check made out to your order which you deposited, in the sum of a thousand dollars, dated that date?

A. Yes, September 25, 1928.

Mr. Guzik: I offer that in evidence.

Mr. Levin: No objection.

(Marked Defendant's Exhibit A.)

[fol. 54] X Q. 177. Now, when he lent you that sum of $1,000.00, did he ask you how your business was at that time?

A. He didn't ask me.

X Q. 178. Did he inquire as to how your business was getting along?

A. He asked "How are you getting along in business?" and I told him I am getting along all right.

X Q. 179. Did you repay this sum of $1,000.00?

A. Yes, sir.

X Q. 180. How did you repay that?

A. I think I repaid it in three payments, or four payments.

X Q. 181. Do you remember when you made the first payment to Morris Schoenthal on this sum of $1,000.00?

A. I couldn't recollect that.

X Q. 182. In January, 1930, before you received this loan of $500.00, did you make any payments to Morris Schoenthal on the old loan of a thousand dollars?

A. I think I did.

X Q. 183. Did you, in January, 1930, while you still owed Morris Schoenthal a balance on the first loan, ask Morris Schoenthal to lend you money?

A. Yes.

X Q. 184. What did he say?

A. He said, "Pay me back whatever you owe me on the old loan and I will give you more."

X Q. 185. And did you, pursuant to that request, repay Morris Schoenthal the balance of that loan?

A. Yes, sir.

X Q. 186. I show you your book, or checkbook stub, No. 6541, showing a check to Morris Schoenthal in the sum of $250.00. Is that the last payment you made to Morris Schoenthal on the first loan of a thousand dollars?

A. I think it was. Yes. Payment of note, yes.

X Q. 187. I show you this check for $500.00, dated January 27, 1930, and ask you whether that represents loan made to you by Morris Schoenthal in that sum?

A. Yes, sir.

[fol. 55] Mr. Guzik: I offer it in evidence.

Mr. Levin: No objection.

(Marked Defendant's Exhibit B.)

X Q. 188. In other words, Mr. Smith, two days after you paid Morris Schoenthal $250.00, he lent you $500.00?

A. Yes, sir.

X Q. 189. And the only way you could get that second loan of five hundred dollars was to pay him the old loan of $250.00, is that it?

A. Yes.

X Q. 190. Now, did you tell Morris Schoenthal in Janu-

ary, 1930, at the time you paid him that loan, the exact condition of your business?

A. No, I never knew myself exactly.

X Q. 191. Did he ask you at that time the exact condition of your business?

A. He asked the general question, "How is business?"

X Q. 192. And that was in a sort of friendly way, was it not?

A. Yes.

X Q. 193. In June, 1930, you came to Morris Schoenthal for a loan, did you not?

A. Yes.

X Q. 194. How much did you ask him for?

A. A thousand dollars.

X Q. 195. Was there at that time due Morris Schoenthal five hundred dollars?

A. Yes.

X Q. 196. What did Morris Schoenthal tell you?

A. "You pay me back whatever you owe me and we will see what we are going to do further."

The Court: Said what?

The Witness: "Pay me back and we will see what I can do for you later."

X Q. 197. You were contemplating in June, 1930, getting an extension from your creditors, were you not?

A. Yes.

[fol. 56] X Q. 198. And that would require a considerable amount of cash, would it not?

A. Yes.

X Q. 199. Did you have any cash resources of your own, sir?

A. No, I didn't have any.

X Q. 200. From whom did you expect to get the money to finance the cash settlement?

A. Well, one of them would be Morris Schoenthal.

X Q. 201. Did you know that if you owed any money to Morris Schoenthal you could not get any new loans from him?

A. He told me that is his usual custom, the first thing to collect whatever I owe him.

X Q. 202. In other words, you would have to pay him first

the balance due at that time, and then he would make you another loan?

A. Yes, sir.

X Q. 203. Was Morris Schoenthal ever down at your place of business?

A. Never since I was in business.

X Q. 204. Did he ever take any active interest in the place of business?

A. Was never up there.

X Q. 205. Did Morris Schoenthal ever get any profit from your business?

A. Profit? A. No, never.

X Q. 206. Did you ever pay Morris Schoenthal a cent of interest on any of his loans?

A. He never wanted interest.

X Q. 207. Did he ask for interest?

A. He didn't ask.

X Q. 208. This petition that was filed against you was an involuntary petition, was it not?

A. Yes, sir.

X Q. 209. Now, in May, 1928, were you pressed by a creditor, the Foster Yarn Company?

A. Yes, sir.

X Q. 210. How much did you have to pay the Foster Yarn Company?

A. $6,000.00.

X Q. 211. Did you make a payment to the Foster Yarn Company of $500.00?

A. Yes, sir.

[fol. 57] X Q. 212. Where did you get that money from?

A. From Fanny Schoenthal.

X Q. 213. I show you this check dated May 28th, and ask you whether that represents the $500.00 you got from Fanny Schoenthal?

A. That is the last check.

X Q. 214. That is the last check?

A. Yes, this check, this money I got from her and I paid the Foster Yarn Company.

X Q. 215. So with this loan from Fanny Schoenthal you held off the Foster Yarn Company, did you not?

A. Yes, sir, yes, sure.

Mr. Guzik. I offer this check in evidence.

Mr. Levin: No objection.

(Marked Defendant's Exhibit C.)

X Q. 216. At what place did you receive this check from Fanny Schoenthal?

A. My house.

X Q. 217. Did you tell Fanny Schoenthal what the purpose was for which you needed this?

A. I told her I needed it to pay some bills.

X Q. 218. When did you tell her you would pay it back?

A. Two or three days.

X Q. 219. Did Fanny Schoenthal tell you that she needed money in June in order to pay for her real estate bills?

A. She told me she can only give me the money for two or three days, not any longer, because she needed the money herself.

X Q. 220. In other words, you knew she would have to have that money in June to pay for her real estate taxes, interest on mortgages?

A. Yes, sir.

X Q. 221. Is that why she told you you would have to give it back in a few days?

A. Positively.

[fol. 58] X Q. 222. In January, 1930, Fanny Schoenthal gave you $500.00. Is this the check for that? At the time that Fanny Schoenthal gave you this check for $500.00 did she know the condition of your business, did she ask you?

A. She asked a general question, same as everybody, "How is business?", and I told her I am getting along all right.

X Q. 223. Did she ask you about your inventory?

A. Never asked about that.

X Q. 224. Did she ask you how much cash you had in the bank?

A. Didn't ask me that.

X Q. 225. Did she ask how much your financial statement showed?

A. She didn't ask me that.

The Court: In other words, the only question she asked was the question any relative would ask, is that correct?

The Witness: Sure.

Mr. Guzik: I offer this check in evidence.

Mr. Levin: No objection.

(Marked Defendant's Exhibit D.)

X Q. 226. Morris Schoenthal is a brother of your wife's?
A. Yes.
X Q. 227. Did your wife know about these loans?
A. Sure.
X Q. 228. When did you propose to your creditors an extension of your debts?
A. I think that was in July.
X Q. 229. And as a result of that the petition was filed against you, was it not?
A. Yes.
X Q. 230. Did you have any suits pending against you before that?
A. No.
X Q. 231. Did any of your creditors take any proceedings against you prior to that time when you told them your true condition?
A. No.
[fol. 59] X Q. 232. How much did you owe to the Foster Yarn Company at that time?
A. I think around $6,000.00.
X Q. 233. Did they take any proceedings against you?
A. No, everybody was lenient to me; knew me for many years.
X Q. 234. How long have you been in business?
A. Oh, about twenty-five years.
X Q. 235. Did you ever have any other bankruptcies?
A. No.
X Q. 236. Were there any judgments against you in June, 1930?
A. No judgments.
X Q. 237. Were there any suits pending against you?
A. No.
X Q. 238. You had $1770.00 in outstanding accounts, according to your statement, is that correct?
A. Positively.
X Q. 239. Some of these names represent large firms, do they not?
A. Yes.
X Q. 240. Is it not a fact that if you wanted money you

could have gotten this money from these firms if you offered them a discount?

A. Positively.

X Q. 241. Did you do that?

A. No.

X Q. 242. Weiner & Jaffe, 552 Broadway, owed you $502.00. That is a large concern, is it not?

A. Sure.

X Q. 243. Could they have given you the $500.00 at a discount?

Mr. Levin: I object to what might have happened.

The Court: You would have to bring the other people in to state what they would do.

Mr. Guzik: I will withdraw it.

[fol. 60] X Q. 244. Did you make any attempts to cash in on your accounts receivable?

A. No.

X Q. 245. Did you make any jobber sales in June, 1930?

A. Some of it, yes.

X Q. 246. How much of the stock of inventory did you have left at the time the petition was filed against you?

A. I think I got around $16,000.00.

Mr. Guzik: May I ask the trustee to state the proceeds of sale by the trustee of the stock and fixtures.

Mr. Levin: I read into the record that the trustee's balance amounted to in excess of three thousand dollars.

Mr. Guzik: And I want the balance. I want the proceeds of the inventory and proceeds of stock and fixtures.

Mr. Levin: The total receipts of the receiver were $5,756.44. This represents gross receipts from the auction sale of all property, the collection of accounts receivable and bank interest.

Mr. Guzik: May I ask the trustee to state whether there are any outstanding uncollected accounts receivable?

Mr. Levin: I can speak only generally, that there are uncollected accounts receivable in process of collection. One of those I know, of my own knowledge, to be the Manhattan Jobbing Company, and is in suit. That is as far as I can tell you right now. I can get you the specific information, if you want it.

Mr. Guzik: I will appreciate it, if you can.

X Q. 247. Did you call any creditors' meetings before June 1st, 1930?

A. No.

[fol. 61] X Q. 248. Did you make any offer to your creditors at any time prior to the dates on which you paid the $500.00 to Morris Schoenthal and the thousand dollars to Fanny Schoenthal?

A. No, I did not.

X Q. 249. At the time you made these payments did you have any idea that you were insolvent?

A. No, I never had that idea. I thought I am all right.

X Q. 250. How old is Fanny Schoenthal?

A. She is maybe around—over fifty-five, I guess.

X Q. 251. So when you testified before the receiver in the 21-A examination that she was about thirty, that was a mistake, was it not?

A. I am surprised that you say that.

X Q. 252. If you were told that that is your testimony before the Referee, would you be surprised?

Mr. Levin: I object.

The Court: You are not concerned with whether he is surprised.

X Q. 253. Is this answer correct: "Q. How old is she?" meaning Fanny Schoenthal; "A. Around thirty." Is that correct?

A. No.

X Q. 254. You have seen Fanny Schoenthal?

A. Yes.

X Q. 255. Does she look like thirty? How old does she look like?

A. Over fifty—fifty-five.

X Q. 256. That is her true age, is it not?

A. Yes.

X Q. 257. In July, when you made the proposal for extension to your creditors, what happened?

A. They refused it.

X Q. 258. Did you make any further attempt to keep in business?

A. No, I gave them an offer of twenty-five per cent settlement.

X Q. 259. Did you make any attempt to file a petition in bankruptcy?

A. No.

[fol. 62] X Q. 260. The petition was filed involuntarily against you?

A. Yes, sir.

X Q. 261. Did you have a lawyer in the proceedings?

A. No.

X Q. 262. Did you have a lawyer present when you were examined on the 21-A examination?

A. No; I couldn't afford it.

X Q. 263. Did you make a large withdrawal of cash from your business in June, 1930, for your own purposes?

A. No.

X Q. 264. All you drew was fifty dollars a week for your own living?

A. Yes, sir.

X Q. 265. Did you pay your labor at that time?

A. Yes, sir.

X Q. 266. In June, 1930, your sales book shows a considerable amount of cash sales. Is it not a fact that most of those sales were on ten days credit?

A. You see, we used to charge them cash but they never paid cash; sent their check in ten days, twenty days.

X Q. 267. But it was noted as net cash, is that not correct?

A. Not correct; some of them is correct, but not all.

X Q. 268. In other words, some of these you have noted in here net cash did not pay until ten days?

A. No.

X Q. 269. Some of them were new accounts?

A. New accounts, never sold them before and didn't want to give them any trial.

X Q. 270. In other words, you did not want to take their credit?

A. No.

X Q. 271. In June, 1930, did you tell Fanny Schoenthal that you were about to go under and that you were about to file a petition in bankruptcy, or anything to show that you were insolvent?

A. No, I never told her that.

X Q. 272. Did you say anything like that to Morris Schoenthal?

A. No, sir.

[fol. 63] X Q. 273. Did you give them any reason to believe that you were about to file a petition in bankruptcy or that a petition in bankruptcy or that a petition in bankruptcy was about to be filed against you?

A. I was always under the impression I am solvent.

The Court: Answer the question.

The Witness: Never answered that.

X Q. 274. At the time you gave them these payments did you intend to file a petition in bankruptcy?

A. No, sir.

Mr. Guzik: That is all.

Redirect examination.

By Mr. Levin:

R. D. Q. 275. Did I unders' nd you to say, Mr. Smith, that there were no suits started against you?

A. Not that I recollect.

R. D. Q. 276. How about the Davis Yarn Company, did they start a suit?

A. Well, I was served with a summons.

R. D. Q. 277. Oh, I see, you were just served with a summons?

A. That was the two days before the meeting.

R. D. Q. 278. I did not ask you when; I merely asked you whether anyone started a suit against you.

A. I answered that question. The Davis Yarn Company served me a summons two days before the meeting.

R. D. Q. 279. So you were incorrect when you told counsel that nobody started suit against you?

Mr. Guzik: I object. I asked him about June.

(R. D. Q. 279 repeated.)

The Court: Were you incorrect?

[fol. 64] The Witness: I wasn't incorrect. I think it was the summons was served at the same time they had the meeting, if I recollect, and they withdrew it right away.

R. D. Q. 280. Where did you turn over these checks to the relatives to whom you made payments in June, at your place of business?

A. No.

R. D. Q. 281. Where?

A. Well, I was over to Mr. Schoenthal's house when I gave him the check.

R. D. Q. 282. Is that where you gave Fanny Schoenthal the check?

A. No, Fanny Schoenthal was in my house.

R. D. Q. 283. Where does she live?

A. You have records there.

R. D. Q. 284. I am asking you that.

A. Where does she live now?

R. D. Q. 285. Where did she live?

A. St. Ann's Avenue. I don't remember the number.

R. D. Q. 286. Is that very far from your house?

A. Yes, she used to come to my house often.

R. D. Q. 287. I understand she is a very sick woman and cannot travel much.

A. Not at that time.

R. D. Q. 288. How long has she been sick?

A. Since 1931, I guess.

R. D. Q. 289. Who prepared the schedules in bankruptcy for you?

A. My accountant.

R. D. Q. 290. That is the same accountant that you have paid that hundred dollars to?

A. Yes, sir.

R. D. Q. 291. Is he a lawyer?

A. No.

Mr. Levin: That is all.

Recross-examination.

By Mr. Guzik:

R. X Q. 292. Just a minute, Mr. Smith. This Davis Yarn Company summons, was that in June, 1930?

A. July.

Mr. Guzik: That is all.

Mr. Levin: The plaintiff rests.

[fol. 65] MOTION TO DISMISS

Mr. Guzik: If your Honor please, at this time I move to dismiss the complaint on the ground that there is no equity jurisdiction in that it is an action to recover a stated sum of money, which, under the Constitution of the United States, the defendant is entitled to a jury trial on the law side of the Court; and I further move that the plaintiff has wholly failed to make out a cause of action. He has not only failed to prove insolvency at the time of these payments, but he has failed to prove any notice or reasonable cause on the part of these people to know that this man contemplated—or, in fact, how could he contemplate when, as he says, there was a petition filed in July, 1930, and there wasn't a single suit pending against him in June, 1930.

The Court: Motion denied. Exception.
Mr. Guzik: I respectfully except.

Prima facie proofs closed.

DEFENDANTS' PROOFS

MORRIS SCHOENTHAL, called as a witness in his own behalf, having been duly sworn, testified as follows:

Direct examination.

By Mr. Guzik:

Q. 1. You are the defendant, Morris Schoenthal?
A. Yes, sir.
Q. 2. Where do you reside?
A. Home or business?
[fol. 66] Q. 3. Reside, where do you live?
A. In 1475 Sheridan Avenue, Bronx.
Q. 4. In June, 1930, you received the payment of $500.00?
A. Yes, sir.
Q. 5. From Leonard H. Smith, in repayment of a loan that you made to him, is that so?
A. Yes, sir.
Q. 6. At the time he gave you that check for $500.00, did you know the condition of his business?

A. Absolutely not.

Q. 7. Were you ever at his business?

A. Not in my life, I am sorry.

Q. 8. Did you ask Leonard H. Smith the condition of his business at that time?

A. Never.

Q. 9. Did you have any reason to believe that Leonard H. Smith was in an insolvent condition?

Mr. Guzik: I will withdraw that.

Q. 10. Did you know that his condition was bad?

A. No, I didn't know at all.

The Court: What day?

Q. 11. On June 9th, when you received the check of $500.00 from Leonard H. Smith, did you have any reason to believe, to know the true condition of his business?

A. I didn't know anything whatsoever.

Mr. Guzik: That is all.

Cross-examination.

By Mr. Levin:

X Q. 12. What business are you in, Mr. Schoenthal?

A. In silk, velvets, and ribbons, since thirty years.

X Q. 13. That is a corporation?

A. Corporation since eight years.

[fol. 67] X Q. 14. And you are the head of that firm?

A. I am the president of the Morgan-Kunze, Inc.

X Q. 15. Who is your accountant?

A. For the business?

X Q. 16. Yes.

A. Tropp; Marty Tropp, I think it is.

X Q. 17. What is the firm?

A. This I don't know. You have to call up the office—Joseph N. Tropp.

X Q. 18. These loans that were made by you were on the basis of short time loans, is that right?

A. I would make all the time, say, thirty or sixty, only I got to get it.

X Q. 19. Please, when you originally made this loan of a thousand dollars, in January, 1930——

A. 1928. 1928, please.

X Q. 20. I am talking about the loan in January, 1930, of $1,000.00.

A. I never gave him a thousand dollars.

X Q. 21. $500.00; I beg your pardon—when was that to be repaid?

A. Short times.

X Q. 22. Mr. Smith testified it was to be repaid in thirty days.

A. I suppose so. I don't remember.

X Q. 23. Is that right?

A. Yes.

X Q. 24. When was the other loan made of $500.00?

A. There was no other loan. There is no other loan, please. Only five hundred.

X Q. 25. That is the only transaction you have had?

A. And the thousand dollars was before—1928, the 25th of September.

X Q. 26. When did you commence asking Mr. Smith for the return of this $500.00?

A. After thirty days. He happened to come up in my house. I asked him how about the money. He says, "Surely, I am going to pay you."

X Q. 27. How long had you been asking him?

A. I don't remember.

[fol. 68] X Q. 28. Did you get a promissory note for the loan?

A. No note, no interest, nothing whatsoever.

X Q. 29. When the second thirty days expired, did you say anything to Mr. Smith about the return of the money?

A. When he came up to my house—my wife broke her leg——

X Q. 30. Talk more slowly.

A. From the accident in the subway and they came visiting my wife and I would ask him for the money and he said, "I am going to give it to you shortly."

X Q. 31. Did you ask him for the money in March?

A. I don't remember.

X Q. 32. Did you ask him for the money in May?

A. I don't remember. Maybe I asked him before or after.

X Q. 33. Did you ask him for the money in June?

A. You are asking me questions in May, when I don't remember whether I asked him——

The Court: Just answer the question.
The Witness: I couldn't answer, your Honor.
The Court: Then say so.
The Witness: It is something I cannot say.

(X Q. 33 repeated.)

The Court: Say yes or no, or you do not know.
The Witness: I don't remember.

X Q. 34. Is it not a fact that this money was returnable by Smith at any time that he wanted?
A. Oh, no, I would ask him for the money. I needed it.
X Q. 35. You needed the money?
A. I need it all the time, yes, to give somebody else.

[fol. 69] Mr. Guzik: If your Honor please, may I suggest to you, Mr. Schoenthal, as a lawyer, to answer questions?

X Q. 36. Did you need this money in June?
A. I need the money all the time, on account I bought bonds and stock. I have proof of it right here.

The Court: You are not called upon for that. Put it back in your pocket.

X Q. 37. You are not called for that yet.
A. I haven't been in court for forty years.

Mr. Guzik: Will you listen to the Court, Mr. Witness? Will you please put that book in your pocket as you are told?

X Q. 38. Mr. Smith did not return this money in June to you because you needed it?
A. I was asking all the time. I wanted to get paid.

The Court: Just a minute. You needed this money? Answer yes or no.
The Witness: Yes.

X Q. 39. You came to Mr. Smith?
A. I didn't come; he came to my house.
X Q. 40. Did you go to Mr. Smith and say I need this money badly?
A. I said I want to get back the money I loaned him on account of him asking for more money. I said my policy

for thirty years, for different people I want to loan it, but I want to get back the money owing before I loaned any more money.

X Q. 41. I understood you to say that you told Mr. Smith you needed this money?

A. I had a right to say so.

[fol. 70] X Q. 42. I am not quarreling with you. I am trying to find out the facts.

A. I had a right.

X Q. 43. Did you need the money?

A. I did need the money. That is my business.

The Court: Do not get into an argument.

X Q. 44. Do you not know, as a matter of fact, Mr. Schoenthal, when I examined you before the Referee you told him you did not need the money?

A. I don't remember. It was in August. How could I remember?

The Court: Just say you do not remember.

X Q. 45. Now, reading from your examination conducted before the Referee on August 8th, 1930.

A. Right.

X Q. 46. I read you this question and answer, which you gave:

"Q. I understood you to say you loaned this money with the understanding that he could pay it back whenever he had it?

A. He was my cousin, and I helped him out. I didn't need it, but I would ask him. I didn't need the money."

A. Ask——

X Q. 47. Was that answer right?

A. I don't remember what, but I needed the money.

The Court: You don't remember. That is all.

Redirect examination.

By Mr. Guzik:

R. D. Q. 48. In January of 1930, Leonard H. Smith owed you $250.00, is that correct?

A. I have here a little ticket——

[fol. 71] R. D. Q. 49. Do you know, or do you not know?
A. Yes.
R. D. Q. 50. And before you lent him another $500.00, you asked him to repay that to you?
A. First pay.
R. D. Q. 51. So two days after he paid you $250.00 you lent him $500.00?
A. Right. I gave him $500.00.

Recross-examination.

By Mr. Levin:

R. X Q. 52. Just one minute. Now, was this loan a thirty day loan, or was Mr. Smith to have the privilege of paying it back whenever he could?

Mr. Guzik: I object as already answered.
Mr. Levin: I will withdraw the question.

Motion to Dismiss

Mr. Guzik: The defendant rests and renews the motion made at the close of the plaintiff's case.
The Court: Motion denied.
Mr. Guzik: May I at this time renew a motion for the adjournment of the preference action of Fanny Schoenthal on the ground that she is ill and can not testify? If counsel for the trustee will concede if she were present she would testify that she had no knowledge——
Mr. Levin: For the purpose of the record, I will concede that Fanny R. Schoenthal, if called, would testify in substance that she had no knowledge of the bankrupt's financial condition and made no inquiry.

(Argument off the record.)

[fol. 72] Mr. Guzik: I offer this statement of the doctor in evidence.
Mr. Levin: I object to the statement offered in evidence on the ground that it is immaterial and irrelevant, and, furthermore, it has been altered, that there have been additions since it was submitted to me.
Mr. Guzik: It was what the doctor stated.

Mr. Levin: In view of the fact that the bankrupt saw this witness at his house, there was a change.

The Court: Read it.

Mr. Guzik (reading):

OFFER IN EVIDENCE

"STATE OF NEW YORK,
County of New York, ss:

"Dr. Lester Moskowitz, being duly sworn, deposes and says, That I am a practising physician duly licensed to practice in the State of New York and was admitted to practice in the year 1909.

"I am personally familiar with Miss Fannie R. Shoenthal and have attended her for the past three years for minor ailments. About a year ago she was stricken with an acute cardiac collapse necessitating her being kept in bed for a period of about two months with constant attention, together with consultations with heart specialists.

"The said Fannie Shoenthal is still suffering from the same illness of cardiac decompensation, as evidenced by shortness of breath, precordial pain, cyanosis; it was impossible for the said Fannie Shoenthal to appear in any [fol. 73] court or for her examination in her home without seriously threatening her life. That condition has existed for nearly a year and still exists at the present time.

"As a physician I advise absolutely against any appearance in court or any examination at her home of the said Fannie Shoenthal, as I fear that strain of such an examination and resultant shock might lead to another serious heart attack, which might prove fatal.

"For the past two months I have only allowed her to go down occasionally and then only to sit in the park for a short while."

Mr. Levin: I object to the admission of this statement in evidence, on the ground that it is immaterial and irrelevant, and on the further ground that the Court has on numerous occasions already ruled that the defendant has not acted diligently to protect its rights under the circumstances. I call your attention to the fact that the issue in this case was joined in November, and set down for trial in

December, and though this defendant's alleged illness has been extended and extended from time to time and no effort has been made or notice given me until the case was on the call calendar and marked ready, that any such application would be made. I question its good faith.

The Court: It is admitted as I understand, as part of the defendant's case; not for the purpose of any motion.

Testimony closed.

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

February (1931) Term

Before Hon. J. Foster Symes, District Judge

Krause & Hirsch, Solicitors for Plaintiff; George C. Levin, Counsel.

Martin Perlmutter, Solicitor for Defendants Schoenthal; Leo Guzik, Counsel.

MEMORANDUM OPINION—Febr. 25, 1931

The COURT (orally):

This action is brought by the Trustee in Bankruptcy under Section 60-B of the Bankruptcy Act to recover from defendants property alleged to have been transferred to them in violation of the statute, in contemplation of bankruptcy. The defendant, Hyman Smith, was not served and is not a party. The case has gone forward against the other two defendants.

Briefly, the testimony discloses all the parties are related, that is to say, Morris Schoenthal and Fannie Schoen-
[fol. 75] thal, brother and sister, are cousins of the bankrupt.

The bankrupt testified that in June, 1930, he did not know how he stood financially, but early in that month hired a public accountant to investigate his business, paying him $100 for so doing. What his report discloses is not in evidence, but very shortly thereafter he offered his creditors twenty-five cents on the dollar.

The defendants Morris Schoenthal and Fannie Schoenthal had been lending money to the bankrupt for some time previous to June, 1930. These loans began in September, 1928. The bankrupt testified he could obtain funds from these parties, $500 or more, at any time upon request. Bankrupt made frequent payments on account or in full followed by further advances to him. These loans were for a short time and were most of the times past due.

Coming down to June, 1930, the month previous to the filing of the involuntary petition the bankrupt testified he went to defendants for more funds. He was refused and was met with a demand for payment of moneys already due.

Beginning June 9, 1930, a short time after he had been informed by the public accountant of the state of his business, he began making the payments to the Schoenthals, which the Trustee here seeks to recover. During that month and previous to the filing of the petition, he paid his relatives in all $2,300, most of it to the defendants Morris and Fannie Schoenthal. During this particular month all his sales were, with few exceptions, for cash or C. O. D.; he further states he had no cash resources and that he knew he was insolvent.

The money paid was due and owing at the time of the payments, and no fraud is alleged or proven. The question [fol. 76] is, under Section 60-B of the Bankruptcy Act, did these payments operate as a preference and did defendants have reasonable cause to believe that the payments would effect a preference, that is, enable them to receive a larger payment on their debt than other creditors of the same class.

Insolvency has been shown. The fact that shortly after the payments were made the bankrupt offered 25 per cent to his creditors is sufficient on that question. It is an admission that his assets equaled 25 per cent of his liabilities.

It has always been my view in similar situations that relatives lending money are generally conversant with their debtor's affairs or have knowledge or such facts as would put them on inquiry as reasonable men. No business man of any experience would lend money continuously, in this case for two years, without making some inquiry or having some knowledge of the business affairs of his debtor.

The defendant, Morris Schoenthal, showed himself to be a very successful business man; standing well with his bankers, and his conduct of his own business reflects credit upon him. That is wholly inconsistent with the claim that he lent money to his relative, without some knowledge of the latter's affairs. Such course of conduct, as here disclosed, is indicative that he either did know or if he did not he was so negligent that he has no standing in a court of equity.

The theory of bankruptcy is that all creditors must be treated alike. If a bankrupt wants to take advantage of its generous provisions, he must do so upon the conditions laid down by the law.

[fol. 77] The Court will make findings of fact and conclusions of law in favor of the plaintiff and against the defendants, and proper exceptions may be allowed.

I find damages in favor of the plaintiff in the sum of $1,500.

—— ——, United States District Judge.

New York, February 25th, 1931.

STATEMENT RE PLAINTIFF'S EXHIBIT 1

Certified copy of an order made by Hon. Harold P. Coffin, Referee in Bankruptcy, dated September 8th, 1930, approving the Trustee's bond.

STATEMENT RE PLAINTIFF'S EXHIBIT 2

Trustee's first report dated September 19th, 1930, shows that the Trustee had a balance on hand on that date to the credit of the Estate in the sum of $5,097.10.

STATEMENT RE PLAINTIFF'S EXHIBIT 3

Order of Referee Honorable Harold P. Coffin, dated September 24th, 1930, declaring a first dividend of 10%.

[fol. 78] PLAINTIFF'S EXHIBIT 4

Schedules in Bankruptcy of Leonard H. Smith, Trading as Faultless Sweater Mills

Schedule "A"—Liabilities:

Priority Creditors	$498.54
Unsecured Creditors	18,401.72
	$18,900.26

Schedule "B"—Assets:

Merchandise Inventory	3,624.88
Machinery, fixtures and tools	9,282.15
Choses in Action	1,770.01
Unliquidated Claims	1,026.73
Bank Account	250.11
	$15,953.88

Total assets	$15,953.88
Total liabilities	18,900.26

Books

General Ledger.
Accounts Payable (Faultless Sweater Mills).
Accounts Receivable (College Sweater Mills).
Accounts Receivable.
Cash Journal.
Purchase Journal.
Check Books: Chatham & Phenix Bank & Trust Co.
Pass Books: Chatham & Phenix Bank & Trust Co.
Shipping Slips—College Knitting Mills.
Charge Books.
Credit Book (front Faultless, back College).
[fol. 79] Salesman's Ledger.
Labor Record.
Duplicates of Charges—College Knitting Mills.
Bank Statements & Cancelled Checks.
Notes Payable Stubs.

(The above schedules were sworn to on August 5th, 1930, and filed on August 18th, 1930.)

PLAINTIFF'S EXHIBIT 5

Faultless Sweater Mills, 105-113 Wooster St.

No. 6784 B. New York, June 7, 1930.

Pay to the Order of Blum Blackman Co. $100.00 Dollars One Hundred Dollars.

Faultless Sweater Mills. L. H. Smith, Proprietor.

Chatham Phenix National Bank and Trust Company, 1-30 Broadway and Howard Street.

Endorsement: Blum Blackman Co.

[fol. 80] PLAINTIFF'S EXHIBIT 6

Faultless Sweater Mills, 105-113 Wooster St.

No. 6787 B. New York, June 9, 1930.

Pay to the Order of Morris Shoenthal $500.00 Dollars Five Hundred Dollars.

Faultless Sweater Mills. L. H. Smith, Proprietor.

Chatham Phenix National Bank and Trust Company, 1-30 Broadway and Howard Street.

Endorsement: Morris Shoenthal.

PLAINTIFF'S EXHIBIT 7

Chatham Phenix National Bank and Trust Company, 1-30 Broadway and Howard Street

No. — B. New York, June 11, 1930.

Pay to the Order of Fanny Shoenthal $500.00 Five Hundred and no/100 Dollars.

Faultless Sweater Mills. L. H. Smith.

Endorsement: Fanny Shoenthal. Fanny R. Shoenthal.

[fol. 81] PLAINTIFF'S EXHIBIT 8

Faultless Sweater Mills, 105-113 Wooster St.

No. 6482 B. New York, June 19, 1930.

Pay to the Order of Fannie R. Shoenthal $500.00/100 Five Hundred and 00/100 Dollars.

Faultless Sweater Mills. L. H. Smith, Proprietor.

Chatham Phenix National Bank and Trust Company, 1-30 Broadway and Howard Street.

Endorsement: Fannie R. Shoenthal.

PLAINTIFF'S EXHIBIT 9

Faultless Sweater Mills, 105-113 Wooster St.

No. 6965 B. New York, June 24, 1930.

Pay to the Order of Hyman Smith $300.00/100 Three Hundred and no/100 Dollars.

Faultless Sweater Mills. L. H. Smith, Proprietor.

Chatham Phenix National Bank and Trust Company, 1-30 Broadway & Howard St.

Endorsement: Hyman Smith. Pay to the Order of the First National Bank of Boston. Smith Furniture Co.

[fol. 82] PLAINTIFF'S EXHIBIT 10

Chatham Phenix National Bank and Trust Company

Outstanding Certified Voucher K 53814

The item described below was charged to your account, but is still outstanding.

Charge Faultless Sweater Mills $500.00

Date certified: 6/30/30. Teller: T. Hyman Smith.

Exchange this slip for above item in a few days

DEFENDANT'S EXHIBIT "A"

Chatham Phenix National Bank and Trust Company,
Seventh Ave. and 39th Street

No. —. New York, Sep. 25, 1928.

Pay to the order of L. Smith $1,000.00/100 Ten Hundred 00/100 Dollars.

Morris Shoenthal.

Endorsement: L. Smith. Faultless Sweater Mills.

[fol. 83] DEFENDANT'S EXHIBIT "B"

Chatham Phenix National Bank and Trust Company,
Seventh Ave. and 39th Street

No. —. New York, Jan. 27, 1930.

Pay to the order of L. H. Smith $500 00/100 Five Hundred Dollars.

Morris Shoenthal.

Endorsement: L. H. Smith.

DEFENDANT'S EXHIBIT "C"

Staten Island National Bank & Trust Company, Port Richmond, S. I., N. Y.

Port Richmond,
No. 68. S. I., N. Y., May 28, 1930.

Pay to the order of Leonard Smith $500 00/100 Five Hundred 00/100 Dollars.

Fannie R. Shoenthal.

Endorsement: Leonard Smith.

[fol. 84] DEFENDANT'S EXHIBIT "D"

Staten Island National Bank & Trust Company, Port Richmond, S. I., N. Y.

Port Richmond,
No. 298. S. I., N. Y., January 30, 1930.

Pay to the order of Leonard Smith $500 00/100 Five Hundred 00/100 Dollars.

Fannie R. Shoenthal.

Endorsement: Leonard Smith.

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—March 2, 1931

The above entitled action having come on to be heard before me at an Equity Term of this Court, and the proofs of both parties having been duly heard on the 24th and 25th days of February, 1931, and the arguments of counsel having been duly considered,

I do hereby make the following findings of fact and conclusions of law:

Findings of Fact

1. That on or about the 10th day of July, 1930, an involuntary petition in bankruptcy was duly filed by three creditors of the bankrupt herein in the United States District Court, for the Southern District of New York, praying that Leonard H. Smith, trading as Faultless Sweater Mills, be adjudicated a bankrupt.

[fol. 86] 2. That thereafter on the 23rd day of July, 1930, an order was duly made in the said Court adjudicating the said individual trading as Faultless Sweater Mills a bankrupt.

3. That at all the times hereinafter mentioned, the plaintiff, Irving Trust Company, was a domestic corporation, organized and existing under and by virtue of the laws of the State of New York, engaged in the banking and trust business.

4. That thereafter at a first meeting of creditors of the said Leonard H. Smith, trading as Faultless Sweater Mills, duly held on the 5th day of September, 1930, before Hon. Harold P. Coffin, Referee in Bankruptcy in charge of said proceeding, the plaintiff was duly elected Trustee in Bankruptcy of the said bankrupt estate, and that plaintiff duly qualified thereafter and has continued to act and is now acting as such Trustee.

5. That within four months prior to the date of the filing of the said involuntary petition in bankruptcy, while insolvent and indebted to the defendants, Morris Schoenthal

and Fannie R. Schoenthal, and divers other creditors of the same class, upon unsecured indebtedness, provable in bankruptcy, and well knowing such insolvency, the said bankrupt did, within four months prior, as aforesaid, and on or about the 9th day of June, 1930, make a transfer of his property to the defendant, Morris Schoenthal, by paying to him the sum of $500.00, and that on or about the 11th day of June, 1930 and the 19th day of June, 1930, within four [fol. 87] months prior as aforesaid, the bankrupt did make transfers of his property to the defendant, Fannie R. Schoenthal, by paying to the said defendant, Fannie R. Schoenthal, the sum of $500.00 on each of the said dates, making a total transfer to the defendant, Fannie R. Schoenthal of $1,000.

6. That the effect of the said transfers to the defendants, Morris Schoenthal and Fannie R. Schoenthal, by the said bankrupt was to enable the said defendants to obtain a greater percentage of their debt than any other creditor of the said bankrupt of the same class as the defendants, and that the said payments did thus operate as a preference under the provisions of the Bankruptcy Act of 1898 and the amendments thereto.

7. That the defendants, Morris Schoenthal and Fannie R. Schoenthal, received the said transfers knowing or having reasonable cause to believe that the said transfer did effect a preference in violation of the provisions of the Bankruptcy Act, and the amendments thereto.

8. That the plaintiff has insufficient assets in its hands to pay the debts of the said bankrupt.

9. That the plaintiff has duly demanded the restoration and return of the said preferential payments, but that the said defendants have in all respects refused the said demands.

Conclusions of Law

1. That the transfers to the defendants, Morris Schoenthal of $500 on or about the 9th day of June, 1930, and to [fol. 88] the defendant, Fannie R. Schoenthal of $500.00 on the 11th day of June, 1930 and of $500.00 on the 19th

day of June, 1930, were preferential and void and constitute a voidable preference within the intent and meaning of Section 60b of the National Bankruptcy Act of 1898 and the amendments thereto.

2. That the plaintiff is entitled to judgment against the defendant, Morris Schoenthal, for the sum of $500.00 plus interest from the 9th day of June, 1930, together with one-third of the costs and disbursements of this action.

3. That the plaintiff is entitled to judgment against the defendant, Fannie R. Schoenthal, for the sum of $1,000.00, plus interest from the 19th day of June, 1930, together with two-thirds of the costs and disbursements of this action.

4. That the plaintiff is entitled to judgment against Morris Schoenthal and Fannie R. Schoenthal accordingly.

Dated New York, March 2nd, 1931.

J. Foster Symes, U. S. D. J.

[fol. 89] IN UNITED STATES DISTRICT COURT

In Equity. No. 55—256

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Leonard H. Smith, Trading as Faultless Sweater Mills, Bankrupt, Plaintiff,

against

MORRIS SCHOENTHAL, FANNIE R. SCHOENTHAL, and HYMAN SMITH, Defendants

DECREE—March 2, 1931

The above entitled action having duly come on for trial before me, and the proofs of both parties having been duly taken on the 24th and 25th days of February, 1931, and after hearing Krause & Hirsch, Solicitors for the plaintiff, by George C. Levin, Esq., of counsel, and Martin Perlmutter, Solicitor for the defendants, Morris Schoenthal, and Fannie R. Schoenthal, by Leo Guzik, Esq., of counsel, in opposition thereto, and due deliberation having been had, and the Court having duly made findings of fact and conclusions of law, and upon the opinion of this Court,

Now on said findings of fact and conclusions of law, and on motion of Krause & Hirsch, Solicitors for the plaintiff, it is

Ordered, adjudged and decreed that the plaintiff, Irving Trust Company, as Trustee in Bankruptcy of Leonard H. [fol. 90] Smith, trading as Faultless Sweater Mills, bankrupt, recover from the defendant, Morris Schoenthal, the sum of $500.00, with interest from the 9th day of June, 1930, amounting to the sum of $21.41, together with one-third of the costs and disbursements of this action as taxed by the Clerk of this Court in the amount of $17.33, making in all the sum of $538.74, and that the plaintiff have execution therefore, and it is further

Ordered, adjudged and decreed that the plaintiff, Irving Trust Company, as Trustee in Bankruptcy of Leonard H. Smith, trading as Faultless Sweater Mills, bankrupt, recover from the defendant, Fannie R. Schoenthal, the sum of $1,000.00 with interest from the 19th day of June, 1930, amounting to the sum of $41.17, together with two-thirds of the costs and disbursements of this action as taxed by the Clerk of this Court in the amount of $34.67, making in all the sum of $1,075.84, and that the plaintiff have execution therefor.

Dated New York, March 2nd, 1931.

J. Foster Symes, U. S. D. J.

[fol. 91] In United States District Court

[Title omitted]

Proposed Findings of Fact and Conclusions of Law of Defendants Schoenthal—March 2, 1931

Sirs: Please take notice that the following are the proposed findings of fact and conclusions of law on behalf of the defendants Morris Schoenthal and Fannie R. Schoenthal.

Findings of Fact

I. That on or about the 9th day of June, 1930, the 11th day of June, 1930, and the 19th day of June, 1930, Leonard H. Smith, trading as Faultless Sweater Mills, was not insolvent.

II. That on the 27th day of January, 1930, the defendant Morris Schoenthal loaned the sum of $500.00 to Leonard H. Smith, and that on the 9th day of June, 1930, the said sum of $500.00 was due and owing from Leonard H. Smith to Morris Schoenthal.

[fol. 92] III. That on or about the 30th day of January, 1930, and on or about the 28th day of May, 1930, Fannie R. Schoenthal loaned to Leonard H. Smith the sum of $500.00 on each of said dates, making a total of $1,000.00 which was due and owing on the 11th day of June, 1930.

IV. That on June 9th, 1930, at the time when Morris Schoenthal received the sum of $500.00 in payment of the aforesaid loan by Leonard H. Smith, the said Morris Schoenthal had no knowledge of any alleged insolvency of the said Leonard H. Smith, nor did the said Morris Schoenthal have any reasonable cause to believe that the said Leonard H. Smith was insolvent.

V. That on the 11th day of June, 1930, and on the 19th day of June, 1930, when Fannie R. Schoenthal received the two respective sums of $500.00 in payment of the loans made by her to Leonard H. Smith, the said Fannie R. Schoenthal had no knowledge of any alleged insolvent condition of the said Leonard H. Smith, and had no reasonable cause to believe that the said Leonard H. Smith was insolvent.

Conclusions of Law

1. That the payments to the defendant Morris Schoenthal of $500.00 on or about June 9th, 1930, and the payments to the defendant Fannie R. Schoenthal of $500.00 on the 11th day of June, 1930, and the $500.00 on the 19th day of June, 1930, were not preferential, and were not void, and did not constitute voidable preferences within the intent and meaning of Section 60B of the National Bankruptcy Act of 1898 and the amendments thereto.

[fol. 93] 2. That the defendant Morris Schoenthal is entitled to judgment against the plaintiff dismissing the complaint together with costs and disbursements of the action.

3. That defendant Fannie R. Schoenthal is entitled to judgment against plaintiff dismissing the complaint on the

merits, together with the costs and disbursements of the action.

Dated New York, March 2nd, 1931.
Respectfully submitted.
Martin Perlmutter, Solicitor for Defendants Morris Schoenthal and Fannie R. Schoenthal, 305 Broadway, Manhattan Borough, N. Y. C.

Denied. J. F. S.

[fol. 94] In United States District Court

[Title omitted]

Assignments of Error—March 18, 1931

Come now the said Morris Schoenthal and Fannie R. Schoenthal, appellants in the above entitled cause, and file the following assignment of errors:

1. The Court erred in denying the motion of said appellants for an order transferring the within cause from the equity to the law side of the Court.

2. The Court erred in denying the motion of the appellants for a trial by jury.

3. The Court erred in refusing the application by the appellant Fannie R. Schoenthal for an adjournment of the trial of the above entitled action.

[fol. 95] 4. The Court erred in denying the motion to sever the actions against the defendants-appellants, and for a separate trial of each action.

5. The Court erred in admitting into evidence on behalf of the appellee over the objection and exception of the appellants the schedules in bankruptcy of Leonard H. Smith, trading as Faultless Sweater Mills.

6. The Court erred in admitting in evidence on behalf of the appellee the following evidence:

(a) Check made by the bankrupt to the order of Blum Blockman & Co. in the sum of $100.00, marked Plaintiff's Exhibit 5.

(b) Check made by bankrupt dated June 24th, 1930, in the sum of $300.00 to the order of Hyman Smith, marked Plaintiff's Exhibit 9.

(c) Memorandum showing check in the sum of $500.00 made by bankrupt to Hyman Smith, marked Plaintiff's Exhibit 10.

7. The Court erred in permitting counsel for the appellee to examine witness L. H. Smith in the following manner over the objection and exception of the appellants:

"Q. Did you or did you not testify as follows before the Referee?

(Counsel for the appellee thereupon quoted at length from an unproved transcript of testimony claimed to have been taken before the Referee in bankruptcy.)

Q. Was that your testimony (referring to the quotation)?

A. Well, some of it is and some of it not."

[fol. 96] 8. The Court erred in denying the motion made by counsel for the appellants at the close of the appellee's evidence to dismiss the complaint on the ground that equity had no jurisdiction, and on the ground that the appellee failed to prove a cause of action as set forth in the bill of complaint.

9. The Court erred in denying the motion made by counsel for the appellants at the close of the entire case to dismiss the complaint and to direct judgment for the appellants.

10. The Court erred in denying the motion made at the close of the case for the adjournment of the action on behalf of the appellant Fannie R. Schoenthal.

11. The Court erred in making the following findings of fact of its decision, to wit: Nos. 5, 6 and 7.

12. The Court erred in making the following conclusions of law of its decision, to wit: Nos. 1, 2, 3 and 4.

13. The Court erred in refusing to find the proposed findings of fact of the appellants Nos. I, II, III, IV and V.

14. The Court erred in refusing to find appellant's conclusions of law marked 1, 2 and 3.

15. The Court erred in granting judgment in favor of the appellee and against the appellants, on the ground that the said judgment was erroneous both on the law and on [fol. 97] the facts, and on the ground that there is no evidence to support the said judgment and the findings made by the Court, and on the ground that the conclusions of law found by the Court were not supported either in law or in fact.

Wherefore appellants pray that the said judgment may be reversed and judgment granted in favor of appellants and against the appellee, dismissing the complaint on the merits, or in the alternative, granting appellants a new trial, together with the costs and disbursements of the action, and for such other and further relief as may to the Honorable Court be just and proper.

Dated New York, March 18th, 1931.

Martin Perlmutter, Attorney and Solicitor for Appellants, 305 Broadway, New York City.

[fol. 98] IN UNITED STATES DISTRICT COURT

ORDER AS TO RECORD—Filed May 18, 1931.

Upon the annexed stipulation dated the 28th day of April, 1931, and

Now, on motion of Martin Perlmutter, attorney for the defendants in the above entitled action, it is

Ordered, that in the appeal now pending in this action to the Circuit Court of Appeals for the Second Circuit, the provisions of Equity Rule 75, in so far as they relate to the reduction of the testimony of witnesses to narrative form, be waived and dispensed with, and that the evidence be printed in full in the record on appeal.

J. M. W., U. S. D. J.

[fol. 99] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It is hereby stipulated by and between the attorneys for the respective parties hereto, that in the appeal now pending to the Circuit Court of Appeals, in this action, the provisions of Equity Rule 75, in so far as they relate to the

reduction of the testimony of witnesses to narrative form, shall be waived, and the evidence printed in full in the record on appeal.

Dated New York, July —, 1931.

Krause & Hirsch, Attorneys for Plaintiff. Martin Perlmutter, Attorney for Defendants.

[fol. 100] Citation, in usual form, omitted in printing.

[fol. 101] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated New York, July —, 1931.

Martin Perlmutter, Attorney for the Appellant.
Krause & Hirsch, Attorneys for the Appellee.

[fol. 102] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 103] In United States Circuit Court of Appeals for the Second Circuit

Irving Trust Company, as Trustee in Bankruptcy of Leonard H. Smith, Trading as Faultless Sweater Mills, Bankrupt, Plaintiff-Appellee,

against

Morris Schoenthal and Fannie R. Schoenthal, Defendants-Appellants; Hyman Smith, Defendant

Appeal from a Judgment in Favor of the Trustee in the District Court for the Southern District of New York

Before Manton, Learned Hand, and Chase, Circuit Judges

Krause & Hirsch, Esqs., Attorneys for Appellee; George C. Levin, Esq., of Counsel.

Martin Perlmutter, Esq., Attorney for Appellants; Leo Guzik, Esq., Martin Perlmutter, Esq., of Counsel.

OPINION—Filed Jan. 4, 1932

Per CURIAM:

Judgment affirmed.

[fol. 104] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

IRVING TRUST CO., as Trustee, etc., Plaintiff-Appellee

vs.

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL, Defendants-Appellants; Hyman Smith, Defendant

Appeal from the District Court of the United States for the Southern District of New York

DECREE—Filed Jan. 11, 1932

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed, with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 105] [File endorsement omitted.]

[fol. 106] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 11, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 108] [File endorsement omitted.]

Endorsed on cover: File No. 36,581. U. S. Circuit Court of Appeals, Second Circuit. Term No. 14. Morris Schoenthal and Fannie R. Schoenthal, petitioners, vs. Irving Trust Co., as trustee in bankruptcy of Leonard H. Smith, etc. Petition for a writ of certiorari and exhibit thereto. Filed March 5, 1932. File No. 36,581.

FILE COPY

MAR 5
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted] 14

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,

Petitioners,

vs.

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,

Respondent.

PETITION OF MORRIS SCHOENTHAL AND FANNIE R. SCHOENTHAL FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HORACE LONDON,
302 Broadway,
New York, N. Y.,
Attorney for Petitioners.

HORACE LONDON,
LEO GUZIK,
MARTIN PERLMUTTER,
Of Counsel.

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CONCLUSION. In view of the above, it is respectfully submitted that the writ of certiorari be granted to the end that the judgment of the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York be reversed and a new trial ordered with directions to transfer the action to the law side of the court and to afford petitioners a trial by jury 30

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No.....

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,

Petitioners,

vs.

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners by their attorney, Horace London, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on January 11th, 1932, affirming a judgment of the United States District Court for the Southern District of New York.

Questions Presented.

1. Whether an action by a trustee in bankruptcy under Section 60b of the Bankruptcy Act (11 U. S. C. A., Sec. 96) to recover a preferential payment of a debt, involving a definite sum of money, must be brought at law or in equity and whether defendant in such an action has a right to a trial by jury.

2. Whether defendants waived their rights to a jury trial at law by filing their answers to the bill of complaint in equity though the answers denied that plaintiffs had no adequate remedy at law and though prior to the trial, defendants petitioned the court to transfer the action to the law side for trial therein by a jury and renewed the motion prior to the taking of evidence.

3. In an action for the recovery of a preference, are the schedules in bankruptcy admissible against the alleged preferred creditor.

Statement.

Respondent, a trustee in bankruptcy, sued to recover $1000 from Fannie R. Schoenthal and $500 from Morris Schoenthal, alleging that the petitioners, who were creditors of the bankrupt, had received preferential payments of their debts within four months of bankruptcy.

The action was brought in equity. Petitioners, who were defendants in the court below, interposed answers denying the allegations of the complaint, including the allegation in paragraph "10th" of the complaint that the trustee had no adequate remedy at law (R. 9).

Thereafter, petitioners moved for an order transferring the case from the equity to the law side of the court and for a jury trial (R. 12). This motion, made on notice to respondent, was based on a petition alleging that a trial of the action on the equity side of the court violated petitioners' rights to a jury trial under the Seventh Amendment and under Section 267 of the Judicial Code. The motion was denied (R. 17), and the denial of this motion was assigned as error on appeal to the Court of Appeals (R. 94).

Before any evidence was taken, the motion for a jury trial was renewed and exception taken to the denial (R. 23). At the end of the plaintiff's case and at the end of the entire case, motions were made to dismiss the complaint for lack of equity jurisdiction, which were denied (R. 65; R. 71).

Judgment was rendered after trial in equity in favor of the respondent, for the sum of $538.14 against petitioner, Morris Schoenthal, and for the sum of $1075.84 against petitioner, Fannie R. Schoenthal (R. 268).

At the trial, the bankrupt's schedules of assets and liabilities were admitted in evidence over objection and exception of petitioners' counsel (R. 26).

No opinion was rendered in the court below and the opinion of the District Court was not reported (R. 220). The case, however, has been unofficially reported and is being used as a precedent in the Second Circuit (see *Irving Trust Co.* v. *Balick*, District Court, So. Dist. of New York, January 25th, 1932, quoted at p. 13, *infra*).

Specifications of Error.

1. The court erred in refusing to reverse the judgment by reason of the fact that the petitioners did not have a trial by jury.

2. The court erred in denying the motion of the petitioners for an order transferring the cause from the equity to the law side of the court and in denying the motion for a trial by jury.

3. The court erred in receiving in evidence the bankrupt's schedules of assets and liabilities.

Reasons for the Allowance of the Writ.

1. The decision of the Circuit Court is in direct conflict with decisions of the Circuit Courts in the 5th, 6th, 8th and 9th circuits, and with decisions of various district courts, and the appellate courts of the States of New York, Michigan, Indiana, Alabama, West Virginia and Illinois.

2. The Circuit Court of Appeals has decided an important question of federal and constitutional Law which has not been and should be decided by this court.

3. The judgment of the court below has deprived the petitioners of a constitutional right to a jury trial.

4. The court below has decided a question of federal and constitutional law in conflict with the decisions of the highest court of the state in which the case was tried.

5. The court below has also decided an important question of evidence as to the admissibility of the bankrupt's schedules which has not yet been passed upon by this court and upon which there is a conflict of authority.

WHEREFORE, it is respectfully submitted that this petition for the writ of certiorari be granted to the

end that the judgment of the court below and of the District Court for the Southern District of New York be reversed and the cause remanded to the District Court with directions to transfer the cause to the law side of the court and to afford petitioners a trial by jury.

Dated, February 23rd, 1932.

MORRIS SCHOENTHAL and
FANNIE R. SCHOENTHAL,
Petitioners,
By HORACE LONDON,
Attorney for Petitioners,
302 Broadway,
New York, N. Y.

LEO GUZIK,
of New York City,

MARTIN PERLMUTTER,
of New York City,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No.....

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,
Petitioners,

vs.

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,
Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion of the District Court for the Southern District is unreported (R. 74). The Court of Appeals for the Second Circuit affirmed the District Court without opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on January 11th, 1932.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925.

Statement.

On July 10th, 1930, an involuntary petition in bankruptcy was filed against Leonard H. Smith and thereafter the respondent was elected trustee.

On June 9th, 1930, petitioner, Morris Schoenthal, received $500 from Leonard H. Smith in payment of a debt. On June 11th and June 19th, 1930, petitioner Fannie R. Schoenthal received two checks of $500 each, in payment of a debt of $1000. It was not disputed by the respondent that the moneys were due and owing to petitioners.

Respondent sued to recover these payments on the ground that they were preferential. No fraud was alleged or proven and the action was based solely on the ground that petitioners had reasonable cause to believe the debtor insolvent and that the payments were preferences pursuant to Section 60b of the Bankruptcy Act.

The action was brought in equity. The answers of the defendants denied the allegations of the complaint including paragraph "10th" to the effect that plaintiff had no adequate remedy at law (R. 25).

Issue was joined on October 27th, 1930 (R. 10). On February 11th, 1931, new counsel were substituted (R. 11), and on February 13th, 1931, petitioners filed a motion on notice to respondent requesting the court to transfer the case to the law side of the court and demanding a trial by jury (R. 34). By this time, the case reached the trial calendar, the court having granted the usual bankruptcy preference. The application was re-

ferred by the Justice sitting at the motion term of the District Court to the Trial Justice sitting in the equity part of the court. The motion was renewed and the Trial Justice denied the motion prior to the taking of any evidence. Petitioners duly excepted (R. 69). After plaintiff's evidence had been submitted, petitioners moved to dismiss the complaint on the ground that equity had no jurisdiction of the action (R. 65), and renewed the motion at the end of the entire case (R. 71). These rulings were assigned as error (R. 94).

In the course of the trial, respondent was permitted to place in evidence over objection and exception of petitioners' counsel the bankrupt's schedules of assets and liabilities (R. 26). This ruling was assigned as error on appeal to the Court of Appeals (R. 95).

Respondent recovered judgment for the full amount of the payments after trial in equity before District Judge Symes.

Argument.

POINT I.

While there is a conflict in the decisions, the weight of authority clearly holds that the defendants are entitled to a jury trial at law and that equity has no jurisdiction of this action.

Petitioners have been unable to find any case in the Supreme Court deciding the question in issue. The circuit courts are in irreconcilable conflict and many State courts have held that the defendant is entitled to a jury trial.

The following cases hold that equity has no jurisdiction of an action to recover a preferential payment and

that the defendants are entitled to a jury trial in an action at law:

Adams v. *Jones*, 11 Fed. (2nd) 759 (5th Cir.), cert. den., 271 U. S. 685;
Warmath v. *O'Daniel*, 159 Fed. 87 (6th Cir);
Edwards Co. v. *La Dow*, 230 Fed. 378 (6th Cir);
First State Bank v. *Spencer*, 219 Fed. 503 (8th Cir.);
Morris v. *Neumann*, 293 Fed. 974 (8th Cir.);
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Turner v. *Schaeffer*, 249 Fed. 654 (6th Cir.);
Lewinson v. *Hobart Trust Co.*, 49 Fed. (2nd) 356 (D. C. N. J.);
Sessler v. *Nemcof*, 183 Fed. 656 (D. C. Penn.);
Allen v. *Gray*, 201 N. Y. 504;
Detroit Trust Co. v. *Old Nat. Bank*, 155 Mich. 61;
Boonville Nat. Bank v. *Blakey*, 166 Ind. 427;
People's Bank v. *MacAleer*, 204 Ala. 101;
Irons v. *Bias*, 85 W. Va. 493;
McCormick v. *Page*, 96 Ill. App. 447.

The following cases hold that the defendants are not entitled to a jury trial and that the action may be brought in equity:

Parker v. *Black*, 151 Fed. 18 (2nd Cir.);
Parker v. *Sherman*, 212 Fed. 917 (2nd Cir.);
Wall v. *Cox*, 101 Fed. 403 (4th Cir.);
Off v. *Hakes*, 142 Fed. 364 (7th Cir.);
Reed v. *Guaranty Sec. Co.*, 291 Fed. 580 (D. C. Mass.);

While this court denied certiorari in the case of *Adams* v. *Jones,* 271 U. S. 685, it is important to note that the Circuit Court there held that the defendants were entitled to a jury trial and reversed a judgment for the trustee after a trial in equity. It is also respectfully submitted that the brief in that case, which has been examined by counsel, did not clearly set forth the conflict in the decisions.

In *Adams* v. *Jones,* 11 Fed. (2d) 759, a trustee brought an action in equity to recover a preferential payment. Defendant's motion for a jury trial and to transfer the case to the law side of the court was denied and judgment rendered in favor of the trustee. The Circuit Court for the Fifth Circuit reversed the judgment and directed a new trial on the ground that the defendants were entitled to a jury trial. At page 759, the court said:

> "This appeal is taken on the ground that the District Court was without jurisdiction to proceed in equity, and therefore should have granted appellant's motion to transfer the case to the law side of the docket. We do not state the substance of the evidence; it is sufficient to say that we concur in the conclusions reached by the District Judge upon the facts. We are of the opinion, however, that appellee has an adequate remedy at law, and that appellant's motion should have been granted.
>
> A common law action, such as replevin, or for money had and received, would have been effectual, and would have afforded a remedy as complete as was or could have been obtained in this equity suit.
>
> Equity jurisdiction does not attach merely for

> the reason that a suit relates to bankruptcy; but whether such a suit should be heard and determined on the equity or law side of the court depends as in other cases, on the nature of the relief sought."

In *Warmath* v. *O'Daniel,* 159 Fed. 87, the leading case on the point, the facts were again the same as in the case at bar, and the Circuit Court for the Sixth Circuit, after a thorough and critical examination of all the authorities, reversed the judgment in favor of the trustee and dismissed the bill without prejudice to an action at law. At page 88, the court said:

> "The evidence produced would be, and was in this case, as completely available in an action at law as in a court of equity. No injunction was sought or required. The issue was one which a jury could readily understand and decide under proper instructions from the Court in respect to the law. It is suggested that the court must first set aside the transfer before it could proceed to judgment, and that it is the peculiar province of a court of equity to set aside unlawful transfers. This is an ingenious, but unsubstantial figment. No distinct or formal preliminary action was required or contemplated by the statute."

In the recent case of *Lewinson* v. *Hobart Service Trust Co.,* 49 Fed. (2nd) 356, the court transferred an action for the recovery of a preference from the equity to the law side of the court. This case was decided by the District Court of New Jersey in the Third Circuit where there is no decision of the Circuit Court of Appeals. Judge Fake, after reviewing the authorities, said:

> "The lines of departure which mark the sharp conflict in judicial approach between the two

> groups of cases above cited are explained with such logic and so convincingly are they adhered to by some of the judges that the question is fraught with much difficulty and cannot be finally settled until it reaches the court of last resort. * * * The conclusion here is that the English Court of Chancery was not exercising jurisdiction to set aside preferential transfers of personal property prior to 1789, except possibly in cases of equitable assets not subject to levy under 13 Eliz C. 5, since it was at that time well established that an adequate remedy existed at law, and, therefore, no such jurisdiction then attached to our federal courts of equity. Had the English courts been exercising such jurisdiction, our federal courts would have been ousted of it by virtue of the clear prohibition in Section 267 of the Judicial Code."

On the other side, we find the case of *Parker* v. *Black*, 151 Fed. 18, where the Circuit Court for the Second Circuit affirmed a judgment in favor of the trustee in equity and refused to require a jury trial. The court said:

> "The point is taken, however, that there was a full, adequate and complete remedy at law to recover the preferential transfer in controversy; and the defense was set up in the answer. Upon this point, we think we should follow the decisions made by two different Circuit Courts of Appeal upon a state of facts practically identical with those of the present case, *notwithstanding we should have been of a different opinion if the question had been originally presented to us.* See *Wall* v. *Cox*, 101 Fed. 403, 41 C. C. A. 408; *Off* v. *Hakes*, 142 Fed. 364, 73 C. C. A. 464." (Italics ours.)

As recently as Jan. 25, 1932, in the case of *Irving Trust* v. *Balick* (So. Dist. of N. Y. unreported) District Judge Caffey denied a motion to transfer an action for the recovery of a preference, to the law side of the court. He cited the decision in this case and said:

> "The authorities (set out in notes 251 and 252 to 11 U. S. C. A., Sec. 96) are in conflict upon whether the actions should be at law or in equity, but it was held by this court as long ago as 1903 (*Pond* v. *New York National Exch. Bank*, 124 Fed. 992) and has been settled by the Court of Appeals for the Second Circuit (*Parker* v. *Black*, 151 Fed. 18; *Parker* v. *Sherman*, 212 Fed. 917) that equity is the appropriate forum. *Counsel have also informed me that recently in Irving Trust Co. v. Schoenthal, the Court of Appeals (without opinion) has affirmed a decision by Judge Symes, sitting in this court, to the same effect.* Motion denied." (Italics ours.)

An examination of these cases reflects the irreconcilable conflict among the decisions as to whether the action for a preference should be brought at law or in equity with the resultant doubt as to defendant's right to a jury trial. The Courts of Appeal for the 5th, 6th, 8th and 9th circuits have held the action to be at law, while the courts for the 2nd, 4th and 7th circuits have held the action to be in equity. The District Courts of New Jersey and Pennsylvania have held the action to be at law, while the District Courts of Massachusetts have held the action to be in equity.

It is further important to note that the Court of Appeals of New York, where this action was tried, has

held that the action is at law and that the defendant is entitled to a jury trial. (*Allen* v. *Gray*, 201 N. Y. 504).

It is respectfully submitted that the question is of prime importance and that this court should finally determine the point involved.

POINT II.

The action being for the recovery of a stated sum of money, defendants were entitled under the Constitution to a jury trial at common law.

The Seventh Amendment to the Constitution guarantees a trial by jury in all cases at common law where the value in controversy exceeds $20.00.

The Supreme Court has repeatedly held that where an action is brought for the recovery of a money judgment, and plaintiff has an adequate remedy at law, the Seventh Amendment guarantees a jury trial and the action must be brought at law and not in equity.

Whitehead v. *Shattuck*, 138 U. S. 146;
Scott v. *Neely*, 140 U. S. 106;
Henrietta Mills v. *Rutherford County*, 281 U. S. 121;
Parker v. *Winnipiseogee, L. C. & W. Co.*, 67 U. S. 545;
Hipp v. *Babin*, 19 How. 271.

In *Whitehead* v. *Shattuck*, 138 U. S. 146, an action was brought to quiet title to real property on the ground that defendant claimed title thereto. This court held that the action could not be maintained because plaintiff had an adequate remedy at law. At page 151, Mr. Justice

Field enunciated the following test to be applied in allocating the respective jurisdictions of law and equity:

> "It would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, *where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.*" (Italics ours.)

In *Scott* v. *Neely*, 140 U. S. 106-110, an action in equity was dismissed because plaintiff had an adequate remedy at law and defendants were entitled to a jury trial at law. This court said:

> "And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity."

This action comes squarely within the test requiring jurisdiction at law. The recovery is purely for a money judgment and no equitable remedies are invoked or necessary.

The amount sued for is definite, *i. e.*, the amount of the debt paid by the bankrupt. There is no need for any equitable remedy, real or fictitious; there is no basis for

any accounting, injunction, reformation or cancellation of documents. Of course this case is not to be confused with one where there is an illegal transfer of real property and the court must annul a deed or conveyance. The payment which the trustee complains of in this case does not differ from hundreds of other transactions which are illegal and give rise to actions for the recovery of money obtained by the wrongdoer.

In *Schank* v. *Schuchman*, 212 N. Y. 352, an action was brought in equity for a restitution of moneys claimed to have been illegally received by the defendants in violation of a state statute prohibiting the seller of merchandise from giving a buyer's agent a secret consideration to induce him to purchase merchandise. The Court of Appeals of New York State dismissed the complant and held that plaintiff had an adequate remedy at law. At page 356, Chief Judge Cardozo held:

> "The plaintiffs seem to have tried to make out a right of action in equity; but whatever rights they have, we think are legal. They do not need at this time the aid of equity. There is nothing at this time for equity to undo. * * * Equity will not entertain an action to declare a rescission of an executed transaction unless a decree announcing the rescission is essential to the suitor's protection."

In this action, there is no need for equity's powers. The transaction is simple and definite and the question is merely whether certain payments were received with knowledge of an impending bankruptcy.

POINT III.

An action for the recovery of a preference is an action at common law and not in equity.

An analysis of the early English cases shows that actions for the recovery of bankruptcy preferences were purely common law actions. The following cases were brought in trover by bankruptcy trustees or assignees for the recovery of money or personal property claimed to be preferential payments by bankrupts. These precedents conclusively show that such actions were of common law origin. All these cases were tried before a jury.

Meggot v. *Miles,* 1 Raymond 286 (1697);
Atkin v. *Barwik,* 1 Strange 165 (1715);
Alderson v. *Temple,* 4 Burr. 2235 (1768);
Hague v. *Rolleston,* 4 Burr. 2174 (1768);
Harman v. *Fishar,* 1 Cowp. 117 (1774);
Rust v. *Cooper,* 2 Cowp. 629 (1777);
Thompson v. *Freeman,* 99 Eng. Rep. 1026 (1786);
Nixon v. *Jenkins,* 2 H Blackstone 135 (1793).

In *Meggot* v. *Miles,* 1 Raymond 286 (1697), assignees in bankruptcy recovered in trover for the value of merchandise held by the defendant on the ground that a bill of sale by the bankrupt to the defendant was fraudulent and a preference because defendant had permitted the bankrupt to remain in possession.

In *Atkin* v. *Barwik,* 1 Strange 165 (1715) the bankrupt had purchased goods from the defendant. A few

days before the bankruptcy, he sent the goods to one P. for redelivery to the defendant. Assignees in bankruptcy sued the defendant in trover on the ground that the redelivery of the merchandise constituted a preference.

In *Alderson* v. *Temple,* 4 Burr. 2235 (1768), the bankrupt had been indebted to the defendant and prior to the bankruptcy sent defendant the note of a third person to apply on the debt. Lord Mansfield held that the assignees in bankruptcy could recover in trover for the amount of the note on the ground that the payment was preferential.

From these cases the conclusion irresistibly follows that the Federal Courts, when they received equity jurisdiction as it then existed in England, did not obtain jurisdiction of actions for the recovery of preferences because such actions were then properly triable at law and not in equity.

Furthermore when rigid forms of action were relaxed, the courts even held that actions to recover preferences could be brought on the theory of money had and received, or in quasi-contract, both purely legal causes of action.

Marks v. *Feldman,* L. R. 5 Q. B. 275 (1870);
Farrow v. *Mayes,* 18 Q. B. 516 (1852);
Cohen v. *Small,* 120 App. Div. 211, affd. 190 N. Y. 568.

In *Marks* v. *Feldman,* L. R. 5 Q. B. 275, a trustee brought an action at law in the Queens Bench Division for money had and received against a creditor alleged to have received a preference by a bill of sale of merchandise. The court held that an action would lie for

money had and received and at page 281, Kelly, *C. B.*, said:

> "With regard to the difficulties which have been raised herein and in the court below as to the form of action, if originally the fraudulent preference had consisted in the payment of a sum of money into the hands of the defendant, it can hardly be disputed, unless indeed we at once abrogate the law as to fraudulent preferences, that an action for money had and received could have been maintained against the favored creditor."

In *Cohen* v. *Small,* 120 App. Div. 211, aff'd 190 N. Y. 568, an action was brought in the Municipal Court of New York City to recover an alleged preferential payment. The defendant contended that the action was equitable and that the Municipal Court therefore had no jurisdiction. The Court held that the action was one at law in quasi-contract and that the court had jurisdiction. Mr. Justice Clarke held at page 216:

> "It seems to me that it is an action to enforce a contract imposed by law upon the creditor who accepts payment from an insolvent debtor. The Bankruptcy Law enters into the contract between a debtor and a creditor and gives a right to the trustee in bankruptcy to recover from the creditor any payment made in violation of the Bankruptcy Law. It is not for a penalty, nor upon a tort. A contract is implied based upon the provisions of the law under which the trustee in bankruptcy proceeds. It is a cause of action given by the statute to the trustee, which statute renders invalid the preference and the payment by the insolvent debtor to the creditor. It comes within

> the class of implied contracts wherein an obligation to repay is imposed by law, irrespective of the purpose of the parties."

From the authorities cited under this point, it is apparent that jurisdiction in equity cannot be supported on historical grounds. As far back as 1697, cases of this character were tried before juries at common law. It is only in later cases in some federal courts that the actions for preferences were clothed with equitable jurisdiction.

An examination of the early cases of *Wall* v. *Cox*, 101 Fed. 403, and *Off* v. *Hakes*, 142 Fed. 364, fails to produce a single authority therein cited supporting jurisdiction in equity. These cases practically assume that equity has jurisdiction without examination or explanation of the basis for this ruling.

On the other hand, the later cases on this subject all hold that equity has no jurisdiction and the action must be brought at law.

POINT IV.

Petitioners were entitled to a trial at law pursuant to Section 267 of the Judicial Code.

Not only did the trial in equity violate the provisions of the Seventh Amendment with respect to jury trials, but it also violated Section 267 of the Judicial Code which provides as follows:

> "Suits in equity shall not be sustained in any case where a plain, adequate and complete remedy may be had at law."

It is difficult to conceive of any reason why the remedy in this case is not adequate at law. All that respondent seeks to recover is money damages; the sum is definite and no accounting is necessary. The history of preference actions shows that as early as 1697 they were brought at law in trover and that the remedy was always deemed adequate.

It is well settled that where a plaintiff has an adequate remedy at law, equity has no jurisdiction to entertain the action.

> *Buzzard* v. *Houston,* 119 U. S. 347-352;
> *Wehrman* v. *Conklin,* 155 U. S. 314-23;
> *N. Y. Guaranty Co.* v. *Memphis Water Co.,* 107 U. S. 205;
> *U. S.* v. *Bitter Root Dev. Co.,* 200 U. S. 451;
> *Equitable Life Ass. Soc.* v. *Brown,* 213 U. S. 25.

In *Buzzard* v. *Houston,* 119 U. S. 347-352, the Supreme Court said:

> "In cases of fraud and mistake, as in any other head of chancery jurisdiction, the courts of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when a like amount can be recovered at law in an action sounding in tort or for money had and received."

The fact that this proceeding arises out of a bankruptcy does not preclude the application of the provisions of Section 267 of the Code.

In *Wehrman* v. *Conklin,* 155 U. S. 314-323, this court held that the provisions of this statute, then embodied

in Section 723 of the Revised Statutes, applied to all forms of action whether authorized under Federal or State Statutes. The Court said:

> "These provisions are obligatory at all times and under all circumstances, and are applicable to every form of action."

In *Eyster* v. *Gaff*, 91 U. S. 521, this court said:

> "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. * * * The same courts remain open to him in such contests and the statute has not ousted those courts of jurisdiction in such action."

The section of the Bankruptcy Act under which this action is brought provides that an action to recover a preference shall be brought in the "District Court"; there is no special provision for equity jurisdiction.

Section 60b of the Bankruptcy Act (11 U. S. C. A. Sec. 96b) under which this action is brought provides as follows:

> "For the purpose of such recovery, any court of bankruptcy as hereinbefore defined and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section I, Subdivision 8, of the Bankruptcy Act which defines the terms used in the Act provides as follows:

> "'Courts of bankruptcy' shall include the District Court of the United States, the Supreme Court of the District of Columbia, and the United States courts of Alaska, Hawaii and Porto Rico."

It follows from an examination of these statutes that the Section authorizing this action merely names the District Court as the forum of litigation without providing or directing that equity have jurisdiction. In view of this fact, the section must be construed together with Section 267 of the Code, and therefore the action properly belongs at law.

In this connection it is important to note that prior to the amendment of 1910 to Section 60b, which added the language above quoted, the Federal Court had no jurisdiction of such an action without consent of the defendant.

Bardes v. *Hawarden Bank,* 178 U. S. 524;
Mitchell v. *McClure,* 178 U. S. 539.

If Congress had intended to restrict these actions to equity, it would have expressly so provided and furthermore such a provision would have been unconstitutional because of the guarantee of jury trial provided for by the Seventh Amendment.

POINT V.

Petitioners' motion to transfer the case to the law side of the court and for a jury trial was the proper procedure and the filing of the answers did not operate as a waiver of petitioners' rights.

It is respectfully submitted that the petitioners did not waive their rights to a trial by a jury at law.

The answers of the petitioners deny the allegations of the complaint that the plaintiff had no adequate remedy at law (R. 9). Issue was joined in October, 1930, and in

January, 1931, the case received a preference and was placed on the calendar for February, 1931. At the February term of Court, an application was made on notice to respondent to transfer the case from the equity to the law side of the court and for a jury trial (R. 12). This motion was denied and a motion was again made before the Trial Justice prior to the taking of evidence in the case (R. 23). Furthermore, at the end of respondent's evidence and at the end of the entire case, petitioners moved to dismiss the complaint on the ground that equity had no jurisdiction of the action (R. 65; R. 71).

It is well settled that a right to a jury trial is not waived by the filing of an answer, as long as the right is demanded before the trial is commenced and any evidence taken, and in some cases, the question may even be raised for the first time on appeal or on the court's own motion.

Twist v. *Prairie Oil & Gas Co.*, 274 U. S. 684;
Killian v. *Ebbinghaus*, 110 U. S. 568;
Parkerson v. *Borst*, 251 Fed. 242 (5th Circ.);
Kelley v. *U. S.*, 30 Fed. (2nd) 193 (C. C. A. 9th);
McConnell v. *Provident Savings L. A. Soc.*, 69 Fed. 113 (C. C. A. 6th);
Allen v. *Gray*, 201 N. Y. 504;
Equity Rule 22.

In *Twist* v. *Prairie Oil & Gas Co.*, 274 U. S. 684, the court held that, at any time in the proceedings, either the trial or appellate court may transfer a case to the law side of the Court for lack of equity jurisdiction. At page 690, the Court said:

> "Either the trial court or the appellate may, of its own motion, take the objection that the case is not within the equity jurisdiction."

In *Parkerson* v. *Borst*, 251 Fed. 242, after the answer had been interposed, defendant moved to transfer the case to the law side of the court on the ground that equity did not have jurisdiction. The Court of Appeals for the Fifth Circuit held that the filing of the answer was not a waiver, even though the motion was made just before the taking of testimony. At page 244, the Court said:

> "The motion, however, was not to dismiss the bill but to transfer the cause to the law side of the docket of the District Court. Equity Rule 22 is as follows: 'If at any time it appears that a suit commenced in equity should have been brought as an action on the law, it shall forthwith be transferred to the law side and be there proceeded with with only such alteration in pleadings as shall be essential.' Under the terms of this rule, we think a motion to transfer is timely made if filed before any testimony has been taken and any hearing, other than on motions or on the pleadings had. The power given to the court by the rule to alter the pleadings, as may be essential to a trial on the law side of the docket, clearly contemplates a transfer after the pleadings are filed.
>
> The defendant's right to a trial by jury, under the Seventh Amendment, is not waived by his not demanding it in his answer."

In *Allen* v. *Gray*, 201 N. Y. 504, the Trustee sued in equity in the Supreme Court of the State of New York to recover an alleged preferential payment under Section 60b of the Bankruptcy Act. At the opening of the trial, defendant demanded a jury trial which was denied. The Court of Appeals reversed a judgment for the trustee on the ground that defendant was entitled to a jury trial.

In this case, not only was a motion made for the

preservation of defendants' right to a jury trial prior to the taking of any evidence, but an affirmative step was taken by the defendants in petitioning the Court to transfer the case to the law side of the court.

The point raised in the court below to the effect that the defendants did not make the motion in good faith is baseless. Because of the fact that this action received a preference under the calendar rules of the Southern District, the case was on the trial calendar within three months after joinder of issue. Petitioners' present counsel were substituted in the action in February, 1931, and at the same term, made the motion.

If petitioners are correct in their contention that the demand for a jury trial could have been made at any time, then it is immaterial that the case was on the equity calendar at the time when the motion was made.

Furthermore, the authorities go even further in holding that even if the point is not raised by the party on the trial, the appellate court may dismiss the action or transfer it to the law side upon proof that equity had no jurisdiction.

POINT VI.

Reversible error was committed by the Trial Justice in allowing in evidence the bankrupt's schedules of assets and liabilities.

The schedules in Bankruptcy were allowed in evidence over objection and exception of petitioners' counsel (R. 26). This ruling was assigned as error to the Circuit Court (R. 95).

It is respectfully submitted that this ruling constituted reversible error because the schedules are inadmissible and are not binding on the defendants.

Grant v. *Nat. Bank,* 197 Fed. 581 (D. C. N. Y.);
Batchhelder v. *Home Nat. Bank,* 218 Mass. 420;
Barr v. *Sofranski,* 130 App. Div. 783-90;
McDonough v. *Cohen,* 90 Conn. 469;
Clifton Merc. Co. v. *Conway,* 264 S. W. 192 (Tex.);
Halbert v. *Pranke,* 91 Minn. 204;
Remington Bankruptcy, 3rd Ed., Secs. 2291; 2260.

In *Grant* v. *National Bank of Auburn,* 197 Fed. 581, an action to recover a preference, Judge Ray said at page 590:

> "It is alleged that the schedules of the bankrupt show a certain amount of unsecured claims. This is equivalent to a statement that the bankrupt so represents and states, but such statement is in no way binding upon the Court or defendant, and the schedules would not be proof or evidence to establish the amount of the indebtedness of the bankrupt as against the defendant."

In Remington on Bankruptcy, *supra,* the author states the following rule:

> "The schedules filed by the bankrupt are inadmissible against the alleged preferred creditor to prove the bankrupt's insolvency. They are the admissions of a mere assignor after he has parted with his interest to the alleged preferred creditor."

Batchelder v. *Home National Bank,* 218 Mass. 420, is precisely in point. An action was brought to recover a

preference under Section 60b of the Bankruptcy Act. The Court held the bankruptcy schedules inadmissible and at page 424 said:

> "The schedules of O'Neil's assets and liabilities filed by him in the bankruptcy proceedings were not properly admissible."

No case has been found in which this Court has decided the question of the admissibility of the schedules. The Circuit Court for the Second Circuit in a prior case in reclamation proceedings left the question open for future decision (*Re Weissman*, 19 Fed. 2nd 769). The following cases have held the schedules to be admissible and thus raising a conflict of authorities:

Lyttle v. *Fifth Nat. Bank*, 39 A. B. R. 690;
Re: *Docher-Foster Co.*, 123 Fed. 190;
Hackney v. *Raymond Bros. Clarke Co.*, 68 Neb. 633;
Assn. of Credit Men v. *Bogle Furn. Co.*, 39 Utah 518.

In this action between the bankrupt's trustee and a creditor, there seems to be no basis for allowing the bankrupt's schedules to be admissible against the creditor who is not bound by the statements of the bankrupt. The list of assets and liabilities drawn by the bankrupt is made without authority from the creditor and as a matter of evidence constitutes pure hearsay.

Furthermore the schedules speak as of the date of the adjudication which of course is subsequent to the date when the alleged preference was given. For this reason, they should be inadmissible on the ground that the condition of the business on the date of bankruptcy has no

relevancy to the condition of the business at a time prior thereto.

This court has repeatedly held that there is no presumption that a bankrupt was insolvent at any time prior to the filing of a petition in bankruptcy.

Liberty National Bank v. *Bear*, 265 U. S. 365;
Gratiot State Bank v. *Johnson*, 249 U. S. 246;
J. S. & J. F. String v. *Birkahn*, 30 Fed. (2nd) 492 (C. C. A.).

CONCLUSION.

In view of the above, it is respectfully submitted that the writ of certiorari be granted to the end that the judgment of the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York be reversed and a new trial ordered with directions to transfer the action to the law side of the court and to afford petitioners a trial by jury.

Dated, February, 1932.

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CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 14.

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,

Petitioners,

vs.

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, etc.

BRIEF FOR PETITIONERS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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No. 14.

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vs.

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court for the Southern District of New York is unreported (R., 57). The Circuit Court of Appeals affirmed the District Court without opinion (54 Fed., 2nd, 1079).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on January 11, 1932. The petition for certiorari was filed on March 5, 1932, and was granted on April 11, 1932. The jurisdiction of this Court is invoked under Section 240a of the Judicial Code as amended by the Act of February 13, 1925.

Statement.

Respondent, a trustee in bankruptcy, sued in the District Court for the Southern District of New York to recover the sum of $1,500.00 from petitioners on the ground that they had received from the bankrupt preferential payments of debts in violation of Section 60b of the Bankruptcy Act (U. S. C. A., section 96b). Respondent conceded that the money had been actually loaned by petitioners to the bankrupt and used in his business (R., 16).

Petitioner, Morris Schoenthal, made a loan of $500 on January 27, 1930, and was paid on June 9th, 1930 (R., 61). Petitioner, Fannie R. Schoenthal, made two loans of $500.00 each, one on January 30, 1930 and one on May 28th, 1930 (R., 63), and was paid by two checks of $500.00 each on June 11, 1930, and June 19, 1930 (R., 61). An involuntary petition in bankruptcy was filed on July 10, 1930, and thereafter respondent was elected as trustee (R., 16).

The action was brought *in equity* to recover the amount of these payments on the ground that petitioners had reasonable cause to believe their debtor insolvent and that they were receiving preferences. No fraud was alleged or proven (R., 4). The answers denied the material allegations of the complaint including the allegation that plaintiff had no adequate remedy at law (R., 6). Issue was joined on October 27th, 1930 (R., 7).

On February 13, 1931, petitioners, represented by new counsel who had just been retained (R., 7), moved on petition and notice of motion for an order transferring the case to the law side of the Court and for a jury trial, on the ground that equity had no jurisdiction and that the action was triable at law before a jury (R., 8). This motion was referred to the Judge sitting in the Equity Trial Term by the Judge at Motion Term before whom the motion had come on to be heard.

Before the taking of any evidence petitioners renewed the motion for a jury trial before the trial judge and requested the Court to transfer the case to the law side of the Court. This motion was denied and petitioners took an exception (R., 15).

At the close of respondent's evidence and again at the end of the case, petitioners moved to dismiss the complaint on the ground that equity had no jurisdiction, and that petitioners were entitled to a jury trial at law (R., 50, 55). Both motions were denied and exceptions were taken by petitioners.

In the course of the trial, in order to prove the insolvency of the bankrupt at the time of the payments to petitioners, respondent offered in evidence the bankrupt's schedules of assets and liabilities filed by him in the bankruptcy proceedings. These schedules were admitted in evidence over objection and exception of petitioners' counsel (R., 17).

Respondent recovered an ordinary money judgment for $1,000.00 and costs against Fannie R. Schoenthal, and $500.00 and costs against Morris Schoenthal (R., 67). While it is submitted that the evidence in the case utterly fails to prove that petitioners had reasonable cause to believe that they were being preferred and that the debtor was insolvent, this point is not urged in this Court as it was not set forth in the petition for certiorari, which was based on the two errors hereinafter mentioned.

All of the above mentioned rulings were assigned as errors to the Circuit Court of Appeals (R., 69).

Assignment of Errors.

I. Petitioners were unlawfully deprived of their right to a jury trial in an action at common law.

II. The bankrupt's schedule of assets and liabilities were improperly admitted in evidence.

POINT I.

Petitioners were unawfully deprived of their right to a jury trial in an action at common law.

There are no decisions by the Supreme Court on the precise question as to whether an action to recover a preferential payment to a creditor under Section 60b of the Bankruptcy Act is maintainable at law or equity, and as to whether in such a case the defendant is entitled to a jury trial. The various Circuit Courts are in apparent conflict, but the weight of authority holds that the action must be tried at law before a jury.

It is respectfully submitted that the principles heretofore enunciated by this Court as to the proper jurisdiction of law and equity compel the conclusion that the action must be tried at common law before a jury and that equity has no jurisdiction.

(a) The action being for a stated sum of money and respondent having an adequate remedy at law, petitioners had a constitutional and statutory right to a jury trial at law and equity had no jurisdiction.

The Seventh Amendment to the Constitution guarantees a trial by jury in all cases at common law where the value in controversy exceeds $20.00. This constitutional right is amplified by Section 267 of the Judicial Code, derived from Section 10 of the Judiciary Act of 1789, which provides as follows:

> "Suits in equity shall not be sustained in any case where a plain, adequate and complete remedy may be had at law."

An analysis of the cause of action alleged in the complaint and as provided for by the statute convincingly

shows that there is absolutely no justification for equitable jurisdiction. The action is purely for the recovery of a definite and ascertained sum of money. Plaintiff in such an action does not seek or need any equitable remedy such as an accounting, injunction, reformation or cancellation. There is not even any question of title to real or personal property. The action simply presents the ordinary situation where the law has declared certain conduct to be illegal and has created a cause of action against the person alleged to have violated the statute.

Where the action is for the recovery of a money judgment and plaintiff has an adequate legal remedy, equity has no jurisdiction and the parties are entitled to a trial by jury in an action at law.

Mathews vs. *Rodgers*, 284 U. S., 521;
Whitehead vs. *Shattuck*, 138 U. S., 146;
Henrietta Mills vs. *Rutherford County*, 281 U. S., 121;
White vs. *Sparkill Realty Corp.*, 280 U. S., 500;
U. S. vs. *Bitter Root Development Co.*, 200 U. S., 451;
Equitable Life Ass. Soc. vs. *Brown*, 213 U. S., 25;
Scott vs. *Neely*, 140 U. S., 106.

In *Mathews* vs. *Rodgers* (284 U. S., 521), an action was brought in equity to enjoin the collection of a state tax alleged to be in violation of the Constitution. The bill was dismissed on the ground that the plaintiffs had an adequate remedy by suing at law for the return of any taxes paid by them. This Court emphasized the fact that a trial at law was required by Section 267 of the Judicial Code, and at page 525, Mr. Justice Stone said:

> "The effect of this section, which was but declaratory of the rule in equity established long before its adoption, is to emphasize the rule and to forbid

in terms recourse to extraordinary remedies of equity where the right asserted may be fully brought at law."

In *Whitehead* vs. *Shattuck* (138 U. S., 146) this Court provided a simple test for the distinction between the respective jurisdictions of law and equity, which leaves no room for doubt that the holding of the Court below was erroneous. At page 151 Mr. Justice Field said:

> "It would be difficult and perhaps impossible to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, *where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.*" (Italics ours.)

In *Henrietta Mills* vs. *Rutherford County* (281 U. S., 121), where again an action in equity was dismissed because plaintiff had an adequate remedy at law, Chief Justice Hughes said at page 127:

> "This Court said in Scott vs. Neely, 140 U. S., 106, 10, that 'whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity.'"

Equitable jurisdiction in this case cannot be supported by the fiction that the statute authorizes a rescission by the trustee of the payment made by the bankrupt. The transaction is fully executed; there is no necessity for equitable remedies and an equitable action is clearly not contemplated by the Statute.

> *Warmath* vs. *O'Daniel,* 159 Fed., 87 (C. C. A.); *Schank* vs. *Schuchman,* 212 N. Y., 352.

In *Schank* vs. *Schuchman* (212 N. Y., 352) an action was brought in equity for restitution of bribes claimed to have been illegally received by the defendants in violation of a statute prohibiting the seller of merchandise from giving a buyer's agent any secret consideration. The Court of Appeals dismissed the complaint and held that plaintiff had an adequate remedy at law. At page 356, Mr. Justice Cardozo, speaking for the New York Court of Appeals, said:

> "The plaintiffs seem to have tried to make out a right of action in equity; but whatever rights they have, we think are purely legal. They do not need at this time the aid of equity. There is nothing at this time for equity to undo. * * * Equity will not entertain an action to declare a rescission of an executed transaction unless a decree announcing the rescission is essential to the suitor's protection."

It is further important to note that *this action is not one which seeks to set aside a fraudulent conveyance by a bankrupt to a stranger;* it is a case of a preferential payment by the bankrupt to a *bona fide* creditor. Jurisdiction to set aside fraudulent conveyances is wholly distinct from jurisdiction to recover preferences; the respective cases are covered by separate sections of the Bankruptcy Act and the distinction was expressly recog-

nized by this Court in the case of *Coder* vs. *Arts*, 213 U. S., 223, at page 241, where Mr. Justice Brandeis said:

> "A consideration of the provisions of the bankruptcy law as to preferences and conveyances, shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. * * * In construing the bankruptcy act this distinction must be kept constantly in mind."

We submit that these principles, which have been so frequently reiterated, clearly demand that actions of this character be tried at law and not in equity. That the respondent is a trustee in bankruptcy, or that the debtor has become bankrupt does not affect the application of the rule. It is immaterial that bankruptcy has intervened because the status of bankruptcy gives no new rights to the trustee, nor does it diminish the rights of the defendant with respect to litigation with the bankrupt or the trustee. Section 267 of the Judicial Code is obligatory on all cases in the Federal courts.

> *Kelley* vs. *Gill*, 245 U. S., 117;
> *Wehrman* vs. *Conklin*, 155 U. S., 314-323;
> *Eyster* vs. *Gaff*, 91 U. S., 521-525.

In *Wehrman* vs. *Conklin* (155 U. S., 314-323) this Court held that the provisions of Section 267 applied to all forms of action whether authorized under Federal or State Statutes. The Court said:

> "These provisions are obligatory at all times and under all circumstances, and are applicable to every form of action * * *."

In *Eyster* vs. *Gaff* (91 U. S., 521) this Court said:

> "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions."

Section 60b of the Bankruptcy Act, under which this action is brought, does not specify whether the action shall be brought at law or equity, and consequently it must follow the action is subject to the provisions of Section 267 of the Judicial Code. Originally, such actions could not be brought in the Federal Courts without the defendant's consent. In 1910, the following amendment was added:

> "For the purpose of such recovery, any court of bankruptcy as hereinbefore defined and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section I, subdivision 8, of the Bankruptcy Act which defines the terms used in the Act, provides as follows:

> " '*Courts of bankruptcy*' shall include the *District Court* of the United States, the Supreme Court of the District of Columbia, and the United States courts of Alaska, Hawaii and Porto Rico."

It follows from an examination of these statutes that the Section authorizing this action merely names the District Court as the forum of litigation without providing or directing that equity have jurisdiction. In view of this fact, the section must be construed together with Section 267 of the Code and the action properly belongs at law.

(b) The English Court of Chancery at the time of the American Revolution did not have jurisdiction of actions for the recovery of preferences.

This Court has held that the equitable jurisdiction of the Federal Courts is that of the English Court of Chancery at the time of the separation of the two countries.

Mathews vs. *Rodgers*, 284 U. S., 521, 529.

A search of the early English authorities fails to produce a single instance where the Court of Chancery entertained an action by a trustee in bankruptcy for the recovery of a preferential payment. The English Bankruptcy Statutes enacted prior to the Revolution made no provision for such actions. The theory of preferences, that one creditor cannot be preferred by the bankrupt over his other creditors after he is insolvent, is purely of common law origin and is wholly unrelated to chancery.

In the following cases among many others, actions for the recovery of preferences were brought at common law, usually in trover or for money had and received:

Meggot vs. *Miles*, 1 Raymond, 286 (1697);
Atkin vs. *Barwik*, 1 Strange, 165 (1715);
Alderson vs. *Temple*, 4 Burr., 2235 (1768);
Hague vs. *Rolleston*, 4 Burr., 2174 (1768);
Martin vs. *Pewtress*, 4 Burr., 2478 (1769);
Harman vs. *Fishar*, 1 Cowp., 117 (1774);
Rust vs. *Cooper*, 2 Cowp., 629 (1777);
Thompson vs. *Greeman*, 99 Eng. Rep., 1026 (1786);
Nixon vs. *Jenkins*, 2 H. Blackstone, 135 (1793).

See also

Lewinson vs. *Hobart Trust Co.*, 49 Fed., 2d, 356;
Marks vs. *Feldman*, L. R., 5 Q. B., 275 (1870);
1 *Remington on Bankruptcy*, §J, pages 13 and 14 (3rd Ed.);
Williston: *Cases on Bankruptcy*, 285.

In *Alderson* vs. *Temple* (4 Burr., 2235), the bankrupt while insolvent sent to the defendant, one of his creditors, the note of a third person in payment of the debt. Lord Mansfield held that the assignees in bankruptcy could recover the amount of the note in an action at common law on the ground that the payment was preferential.

Martin vs. *Pewtress* (4 Burr., 2478) shows the wide jurisdiction of the common law courts to permit recovery of preferences even where the preference was obtained by indirect methods. The defendants, creditors of the bankrupt, employed one, Swartout, to buy merchandise from the bankrupt. He gave his promissory notes for the purchase price, which the bankrupt turned over to the defendants in payment of his debt. Swartout sold the merchandise and the proceeds also were turned over to defendants. Lord Mansfield held that the transaction was illegal and constituted a preference. An objection that the common law action of trover would not lie was overruled. The report states:

> "His Lordship held the action of trover to be maintainable. A trader can't alter the property of goods by a criminal fraudulent transaction to the prejudice to his creditors."

Mr. Remington prefaces his treatise on bankruptcy with an historical introduction in which he discusses English Bankruptcy Law at the time of the American Revolution. In connection with the question at hand he says (pp. 13 and 14):

"Lastly, the provisions of the present law avoiding preferential payments to creditors received with notice, did not then exist. A fraudulent conveyance, to be sure, even then could be set aside, but the mere paying by an insolvent debtor of one creditor, on an honest debt, without the paying of a like proportion to his other creditors, which is what is meant by a preference, was not the subject of any special provisions of bankruptcy law, even if the creditor knew it was a preference at the time he took it, *the bankrupt's creditors being relegated to the Common Law for their only remedies for recovering property from third persons.* Such were the outlines and such the theory of English bankruptcy law at the time the Colonies separated from their Mother country. It will be found indeed that these same ideas prevailed in the first bankruptcy law enacted in the U. S." (Italics ours.)

An examination of these authorities conclusively shows that there is absolutely no historical support for equitable jurisdiction in this case and that the action was not maintainable in the English Court of Chancery.

(c) The weight of authority supports the rule that the action must be tried at law before a jury and that equity has no jurisdiction.

The following cases hold that equity has no jurisdiction of an action to recover a preferential payment and that the defendants are entitled to a jury trial in an action at law:

Adams vs. *Jones,* 11 Fed. (2nd), 759 (5th Cir.), cert. den., 271 U. S., 685;

Warmath vs. *O'Daniel,* 159 Fed., 87 (6th Cir.);

First State Bank vs. *Spencer,* 219 Fed., 503 (8th Cir.);

Gelinas vs. *Buffum*, 52 Fed. (2nd), 598 (9th Cir.);
Edwards Co. vs. *La Dow*, 230 Fed., 378 (6th Cir.);
Turner vs. *Schaeffer*, 249 Fed., 654 (6th Cir.);
Morris vs. *Neumann*, 293 Fed., 974 (8th Cir.);
Lewinson vs. *Hobart Trust Co.*, 49 Fed. (2nd), 356 (D. C., N. J.);
Sessler vs. *Nemcof*, 183 Fed., 656 (D. C., Penn.);
Allen vs. *Gray*, 201 N. Y., 504;
Detroit Trust Co. vs. *Old Nat. Bank*, 155 Mich., 61;
Boonville Nat. Bank vs. *Blakey*, 166 Ind., 427;
People's Bank vs. *McAleer*, 204 Ala., 101;
Irons vs. *Bias*, 85 W. Va., 493;
McCormick vs. *Page*, 96 Ill. App., 447;
Remington; Bankruptcy, Sec. 2237.

The following cases hold that the defendants are not entitled to a jury trial and that the action may be brought in equity:

Wall vs. *Cox*, 101 Fed., 403 (4th Cir.), rev'd 181 U. S., 244;
Off vs. *Hakes*, 142 Fed., 364 (7th Cir.);
Parker vs. *Black*, 151 Fed., 18 (2nd Cir.);
Parker vs. *Sherman*, 212 Fed., 917 (2nd Cir.);
Reed vs. *Guaranty Sec. Co.*, 291 Fed., 580 (D. C., Mass.).

An examination of these two groups of cases shows that the decisions in support of petitioners' contention not only are in the great majority but are much more recent and contain thorough discussions of both sides of the question. On the other hand those cases supporting equitable jurisdiction are either distinguishable or based purely on the authority of irrelevant decisions, and fur-

thermore, none of them have thoroughly examined the problem. Every State Court which has passed on this question has held that the action must be tried at law.

The case of *Wall* vs. *Cox* (101 Fed., 403, 4th Cir.), which was the first decision on the point, is wholly inapplicable. In that case, plaintiff sued in equity to *set aside an alleged fraudulent sale* made by the bankrupt to the defendants and to restrain defendants from disposing of the property. The principal question involved was whether the Federal Courts had any jurisdiction of the case and whether plaintiff was compelled to sue in the State Court. The Circuit Court of Appeals held that the Federal Courts did have jurisdiction, while the Supreme Court (181 U. S., 244) reversed this decision and held that, without the consent of the defendant, the Federal Courts had no jurisdiction. This was clearly not a case of a preference analogous to the case at bar.

In *Off* vs. *Hakes* (142 Fed., 364, 7th Cir.), the action was brought in equity for the recovery of a note which was claimed to have been given to the defendant in fraud of creditors. Technically, it was there necessary to invoke equitable jurisdiction to set aside the delivery of the note and to order an accounting as to what moneys were received by the defendant. The point as to jurisdiction was not raised until appeal. The opinion fails to cite a single case holding that equity has jurisdiction of an action to recover a preferential payment.

The cases in the Second Circuit are decided purely on the principle of *stare decisis* and follow cases in the 4th and 7th Circuits which were then the only decisions on the subject. In *Parker* vs. *Black,* 151 Fed., 18, the following opinion is virtually an authority in support of petitioners:

> "The point is taken, however, that there was a full, adequate and complete remedy at law to recover

the preferential transfer in controversy; and the defense was set up in the answer. Upon this point, we think we should follow the decisions made by two different Circuit Courts of Appeal upon a state of facts practically identical with those of the present case, *notwithstanding we should have been of a different opinion if the question had been originally presented to us.* See *Wall* vs. *Cox,* 101 Fed., 403, 41 C. C. A., 408; *Off* vs. *Hakes,* 142 Fed., 364, 73 C. C. A., 464." (Italics ours.)

In contrast to these quite unsatisfactory cases the Court is respectfully referred to those cases upholding jurisdiction at law decided in the 5th, 6th, 8th and 9th Circuits, and particularly to the case of *Lewinson* vs. *Hobart Trust Co.,* 49 Fed., 2nd, 356, where District Judge Fake examines the early English decisions and concludes that equity never had any jurisdiction of the action either in England or this country. (Extracts from these cases are included in the brief on the petition for certiorari, pp. 11 to 13, and are omitted here for the sake of brevity).

POINT II.

Equitable jurisdiction in this particular action cannot be supported on the theory that it prevents a multiplicity of suits.

In its brief in opposition to the petition for certiorari, respondent's only support for equitable jurisdiction was the contention, which it then raised for the first time, that it was invoked to prevent multiplicity of suits (see respondent's brief, p. 13). This argument is utterly without merit. In the first place there are only three defendants in the action, of which only two, the petitioners, were served. Furthermore, petitioners objected

to the joinder of parties. Before the taking of any evidence a motion was made to sever the actions (R., 15) and the denial of this motion was assigned as error to the Circuit Court of Appeals (R., 69).

Respondent has wholly misunderstood the requirements for equitable jurisdiction to prevent multiplicity of suits. There are at least three reasons why this principle does not apply to this case.

Firstly, the rule is applied only where an action in equity would prevent a multiplicity of suits between the *same parties*. There is no multiplicity of suits between respondent and each petitioner because a single action at law determines the controversy. *Secondly*, it has never been held that the joinder of two defendants in one action gives equity jurisdiction *ipso facto*. If that were so, most actions at law could be brought in equity because in very many cases, there are two or more defendants in an action. *Thirdly*, the issues of law and fact between the parties to this action are not identical because the payments were made to petitioners on different dates and under different circumstances. Each payment represents a different issue of law and fact as to whether the bankrupt was insolvent on the day of payment and as to whether each particular petitioner had reasonable cause to believe he was receiving a preference.

It is respectfully submitted that the case of *Mathews* vs. *Rodgers*, 284 U. S., 521, effectively disposes of respondent's contention. In that case several hundred taxpayers of Mississippi sued to enjoin the enforcement of a state tax law and sought to support the jurisdiction of equity on the ground that it prevented multiplicity of suits. This Court completely rejected this contention and held that there was an adequate remedy at law.

POINT III.

Petitioners did not waive their right to a jury trial.

The only possible ground upon which the respondent can maintain that there was a waiver of petitioners' right to a jury trial at law is that an answer was filed in the equity action, though the answer itself denied the allegation of the complaint that plaintiff had no adequate remedy at law (R., 6).

On the other hand the following steps were taken by petitioners to safeguard their right to a jury trial: (1) Petitioners' answers denied that respondent had no adequate remedy at law. (2) They filed a petition and moved before the Motion Term, on notice to respondent, demanding the transfer of the case to the law side of the Court and a trial by jury (R., 8). (3) Before any evidence was taken a motion was made to the Trial Judge for a jury trial at common law (R., 15). (4) At the end of plaintiff's case a motion was made to dismiss the complaint on the ground that equity had no jurisdiction (R., 50). (5) At the end of the entire case the motion to dismiss was renewed (R., 55). (6) On appeal to the Circuit Court of Appeals the denials of these motions were assigned as errors (R., 69).

It is well settled that a right to a jury trial is not waived by the filing of an answer, as long as the right is demanded before the trial is commenced and any evidence taken, and in some cases, the question may even be raised for the first time on appeal or on the Court's own motion.

Mathews vs. *Rodgers*, 284 U. S., 521;
Twist vs. *Prairie Oil & Gas Co.*, 274 U. S., 684;
Killian vs. *Ebbinghaus*, 110 U. S., 568;
Parkerson vs. *Borst*, 251 Fed., 242 (5th Cir.);
Kelley vs. *U. S.*, 30 Fed. (2nd), 193 (C. C. A., 9th);

McConnell vs. *Provident Savings L. A. Soc.*, 69 Fed., 113 (C. C. A., 6th).

In *Twist* vs. *Prarie Oil & Gas Co.*, 274 U. S., 684-690, this Court said:

> "Either the trial court or the appellate may, of its own motion, take the objection that the case is not within the equity jurisdiction."

The Equity Rules promulgated by this Court clearly indicate that the filing of an answer in an equity action is not a waiver of the right to a jury trial at law.

Equity Rule 22 provides as follows: "If *at any time* it appears that a suit commenced in equity should have been brought as an action at law, it shall forthwith be transferred to the law side and be there proceeded with only such alteration in the pleadings as shall be essential." This rule clearly shows on its face that it was never intended that the mere filing of an answer should operate as a waiver. It clearly contemplates that if the attention of the Court is brought to the question at any time, the defendant has a right to a transfer of the case.

Parkerson vs. *Borst* (251 Fed., 242, 5th Cir.) is precisely in point, and petitioners adopted their procedure from this case. The Court held that a motion to transfer the case to the law side of the Court was a sufficient protection of the defendant's right to a jury trial, even though an answer had been filed. At page 245 the Court, discussing Equity Rule 22, said:

> "Under the terms of this rule we think a motion to transfer is timely made if filed before any testimony has been taken and any hearing, other than on motions or on the pleadings had. The power given to the court by the rule to alter the pleadings, as may be essential to a trial on the law side of the

docket, clearly contemplates a transfer after the pleadings are filed.

The defendant's right to a trial by jury, under the Seventh Amendment, is not waived by his not demanding it in his answer."

The point raised by respondent to the effect that petitioners did not make the motion in good faith is baseless. This action received a preference of the trial by order of the District Court and the case reached the trial calendar only a short time after joinder of issue. Petitioners' present counsel were substituted in the action in February, 1931, and at the same term made the motion for a jury trial. At no time were any depositions taken or interrogatories issued in the equity action and respondent was in no way prejudiced by the mere filing of the answers.

Respondent's contention is based purely on the fact that the question of petitioners' right to a jury trial was not raised by affirmative defense in the answer instead of by the denial of the allegation of the complaint. It would be a travesty on justice to deprive petitioners of their constitutional and statutory rights because of so unsubstantial a distinction even if the right had to be demanded in the answers. But in any event, the cases hold that petitioners even did more than required to do by making a written motion for a jury trial; it is sufficient if the motion is made orally before the trial is commenced and many consider it sufficient if the point be raised on appeal either by a party or by the Court *sua sponte*.

POINT IV.

The bankrupt's schedules of assets and liabilities were improperly received in evidence.

Over objection and exception of petitioners' counsel, the trial Court admitted in evidence the schedules of assets and liabilities which were filed by the bankrupt in the bankruptcy proceedings (R., 26). This ruling was assigned as error to the Circuit Court (R., 95). The schedules were sworn to on August 5, 1930, and filed on August 18, 1930 (R., 60), long after the payments to petitioners and the filing of the petition in bankruptcy.

No case has been found in which this Court or any Court of Appeals has passed on this question. While there is some conflict in the decisions most of the authorities maintain that the sched les in bankruptcy are inadmissible in an action for the recovery of a preference.

Grant vs. *Nat. Bank of Auburn,* 197 Fed., 581 (D. C., N. Y.);
Batchelder vs. *Home Nat. Bank,* 218 Mass., 420;
Trepp vs. *Monongah Glass Co.,* 220 Mo. App., 1099;
Barr vs. *Sofranski,* 130 App. Div., 783-90 (N. Y.);
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Halbert vs. *Pranke,* 91 Minn., 204;
Remington; Bankruptcy, 3rd Ed., Secs. 2291; 2260;
Greenleaf; Evidence, Sec. 180;
Wigmore; Evidence, Secs. 1080-1086.

In *Grant* vs. *National Bank of Auburn*, 197 Fed., 581, an action to recover a preference, the Court held the schedules inadmissible. District Judge Ray at page 590 said:

> "It is alleged that the schedules of the bankrupt show a certain amount of unsecured claims. This is equivalent to a statement that the bankrupt so represents and states, but such statement is in no way binding upon the Court or defendant, and the schedules would not be proof or evidence to establish the amount of the indebtedness of the bankrupt as against the defendant."

In *Remington on Bankruptcy*, Section 2291, the author states the following rule:

> "The schedules filed by the bankrupt are inadmissible against the alleged preferred creditor to prove the bankrupt's insolvency. They are the admissions of a mere assignor after he has parted with his interest to the alleged preferred creditor."

In this action between the bankrupt's trustee and a creditor, there is no basis for permitting the bankrupt's schedules to be admissible against the creditor who is not bound by the statements of the bankrupt. The list of assets and liabilities drawn by the bankrupt is made without authority from the creditor and as a matter of evidence constitutes pure hearsay.

The only purpose for which these schedules could have been offered and admitted in evidence was to show that on the date of the payments to the petitioners the bankrupt was insolvent. It is difficult to see how this fact of insolvency can be shown by admissions of a former owner of title against his transferee, made after the declarant has parted with his title.

In *Greenleaf on Evidence*, at page 302, the author, after discussing the above mentioned rule, says:

> "This most just and equitable doctrine will be found to apply not only to admissions made by bankrupts and insolvents but to the case of vendor and vendee."

Furthermore, it is important to note that petitioners were not parties to the bankruptcy proceedings, and were not bound by any proceedings taken or rulings made therein.

In *Gratiot County State Bank* vs. *Johnson*, 249 U. S., 246, 249, Mr. Justice Brandeis, discussing the status of an alleged preferred creditor with respect to the bankruptcy proceedings, said:

> "But he is under no obligation to intervene, and the existence of the right is not equivalent to actual intervention. Unless he exercises the right to become a party he remains a stranger to the litigation and as such, unaffected by the decision of even essential subsidiary issues."

Furthermore, the schedules speak as of the date of the adjudication which of course is subsequent to the date when the alleged preference was given. They should therefore be held inadmissible because the financial condition of the bankrupt on the date of bankruptcy has no relevancy upon his solvency at a time prior thereto.

This Court has repeatedly held that there is no presumption that a bankrupt was insolvent at any time prior to the filing of a petition in bankruptcy.

Liberty National Bank vs. *Bear*, 265 U. S., 365, 370;

Gratiot County State Bank vs. *Johnson*, 249 U. S., 246.

In *Liberty National Bank* vs. *Bear*, 265 U. S., 365, an alleged preference was obtained on July 20th, 1920, and the petition in bankruptcy was filed on August 6th, 1920. This Court held that there was no presumption that the bankrupt was insolvent on July 20th and said:

> "And, generally, an adjudication in bankruptcy in no way determines whether or not the debtor was insolvent at the time a lien was obtained through legal proceedings against him; there being no presumption arising from adjudication that he was insolvent for any period before the petition in bankruptcy was filed."

CONCLUSION.

It is respectfully submitted that the judgments of the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York should be reversed and the bill in equity dismissed, or, in the alternative, that a new trial be ordered before a jury on the law side of the Court, and that petitioners be awarded costs in this Court and in the Courts below.

Dated, September, 1932.

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IN THE

Supreme Court of the United States

OCTOBER, 1931 TERM.

No. 14

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,

Petitioners,

—against—

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,

Respondent.

RESPONDENT'S BRIEF.

SAUL J. LANCE,
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GEORGE C. LEVIN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER, 1931 TERM.

No. 767.

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,
Petitioners,

—against—

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,
Respondent.

RESPONDENT'S BRIEF.

Statement.

The points in issue involved in this application are twofold:

1. Upon the facts of this case, were the defendants wrongfully deprived of a jury trial?

2. Upon those facts did the reception in evidence of the bankrupt's schedules in bankruptcy constitute reversible error?

It is submitted that upon the facts hereinafter discussed no necessity appears for review by this Court. We shall, therefore, make no extended discussion on the

general propositions developed at length by petitioners as to (1) a defendant's right to a jury trial, and (2) the general admissibility of a bankrupt's schedules in bankruptcy, but instead confine our argument to the position of petitioners on the facts at bar.

Petitioners, relatives of the bankrupt, Leonard H. Smith, are declared by the judgment under appeal to have obtained voidable preferences under §60B of the National Bankruptcy Act (11 U. S. C. A., Sec. 96) in the aggregate amount of $1,500 (fols. 80, 268-9).

Pursuant to recent amendment to the Equity Rules of this Court, the Trial Judge made separate findings of fact and conclusions of law on all of the issues in the case (See fols. 253-264).

The disposition below was affirmed by the Circuit Court without opinion (54 F. (2d) 1079) by Manton, L. Hand, and Chase, *JJ.*

Bearing on the introduction in evidence of the schedules in bankruptcy, the opinion of the Trial Judge indicates that the insolvency of the bankrupt was abundantly established (quoting only the relevant portions, fols. 222-225):

> "Briefly, the testimony discloses all the parties are related, that is to say, Morris Schoenthal and Fannie Schoenthal, brother and sister, are cousins of the bankrupt.
>
> The bankrupt testified that in June, 1930, he did not know how he stood financially, but early in that month hired a public accountant to investigate his business, paying him $100 for so doing. What his report discloses is not in evidence, but very shortly thereafter he offered his creditors twenty-five cents on the dollar * * *.

Coming down to June, 1930, the month previous to the filing of the involuntary petition the bankrupt testified he went to defendants for more funds. He was refused and was met with a demand for payment of moneys already due.

Beginning June 9, 1930, a short time after he had been informed by the public accountant of the state of his business, he began making the payments to the Schoenthals, which the Trustee here seeks to recover. During that month and previous to the filing of the petition, he paid his relatives in all $2,300, most of it to the defendants Morris and Fannie Schoenthal. During this particular month all his sales were, with few exceptions, for cash or C. O. D.; he further states he had no cash resources and that he knew he was insolvent."

During the course of trial and at various stages thereof the petitioners in order to procure an adjournment made various motions, the denial of one of which is here assigned as error, and discussed at length in petitioners' brief (pp. 9-27). The sincerity of these applications was commented upon as follows by the Trial Court (fol. 64):

"I cannot help be impressed, but there is a very studied effort being made here to postpone the case."

POINT I.

The schedules in bankruptcy were properly received in evidence since the bankrupt took the witness stand, and if improperly received, merely constituted cumulative proof on the question of insolvency upon which petitioners offered no contradictory evidence.

Petitioners assert that the admission in evidence of the schedules constituted reversible error. The bankrupt was examined as a witness and testified that the schedules were correct (fol. 120):

> "Q100. In June, 1930, what were your liabilities? A. This I couldn't tell you. You have a record there.
>
> Q101. You signed and swore to the schedules in bankruptcy in this case, did you not? A. Yes.
>
> Q102. Are your schedules correct? A. Positively.
>
> Q103. I call your attention to the fact that your schedules list liabilities totaling $18,900.26? A. That is correct."

The petitioners were not deprived of the opportunity of cross examination. Furthermore the trustee had available in court the bankrupt's books of account (fols. 155, 156). The petitioners were at liberty to employ these books if it was their contention that they establish that the bankrupt suddenly became insolvent.

The involuntary petition in this case was filed July 10th, 1930 (fol. 75). All of the transfers in suit were made within a month prior to the petition. The bankrupt testified that when the end came, he had a bank balance of $250.11 (fols. 33, 125) available for liabilities of $18,900.26 (fol. 232).

There remained however fixed assets of the scheduled value of $15,953.88 which *included* the following: an unliquidated claim of $1,026.73 (fol. 233) representing a salesman's overdrawals, and regarded as uncollectible (fols. 124, 125); a merchandise inventory of $3,624.88 (fol. 232) which had depreciated (fol. 96); and a fixed item of machinery and fixtures stated at $9,282.15, half of which was "three or four years old" and had depreciated in value (fol. 123). From the above it was contended that the scheduled value was at least more than 50% of the actual value.

As against liabilities of $18,900.26, the trustee's balance available for creditors realized from all sources is $5,097.10 (fols. 76, 77, 231).

The bankrupt testified that in the month of June business was dull, that he had very little cash on hand, and had a number of past due bills (fols. 108, 109).

In view of the foregoing, it is clear that no extraordinary improvement or substantial change was taking place in the bankrupt's financial affairs during the month of June to rebut the presumption that the bankrupt admittedly insolvent on the petition date was in the same condition the month preceding.

Wilmot Engineering Co. v. *Blanchard*, 203 N. Y. Supp. 700, 703 (App. Div., 4th Dept., 1924), quoting from the opinion of present Court of Appeals Judge Henry T. Kellogg:

> "It does not appear that its insolvency came about through some untoward happening within the 19 days. *Therefore, if it was insolvent on the 3d day of December, 1921, it was presumptively insolvent on the 14th day of November, 1921.*" (Italics ours.)

To the same effect see *In re Dix,* 267 Fed. 1016 (D. C. N. Y.), decided by Learned Hand, *C. J.,* while sitting in the Northern District holding that where insolvency is undisputed at the time of bankruptcy, it is *prima facie* proof of insolvency a month prior thereto.

Petitioners cite numerous authorities relative to the admissibility of schedules, in some of which the bankrupt did not take the witness stand. *Grant* v. *National Bank of Auburn,* 197 Fed. 581 (see Brief, p. 28) arose on a demurrer to the complaint before trial and is, therefore, distinguishable since the bankrupt was a witness in this case.

The trial court found that insolvency was clearly established (fol. 226):

> "Insolvency has been shown. The fact that shortly after the payments were made the bankrupt offered 25 per cent. to his creditors is sufficient on that question. It is an admission that his assets equaled 25 per cent. of his liabilities."

The Trustee need not in every case burden the estate with the expense of engaging an accountant to interpret the books and records particularly where the insolvency alleged is so close to the petition. Moreover, as has been recognized, schedules are competent proof on the question of financial condition.

> "Upon this question (insolvency) it is proper to consider the condition of the bankrupt's estate as disclosed by the schedules in bankruptcy."
>
> *Lyttle* v. *Fifth National Bank,* 39 A. B. R. 690, 693, affirmed by the circuit court, 250 Fed. 361, Rogers, *C. J.* (*certiorari* denied, 247 U. S. 506).

Collier on Bankruptcy, 13th Edition, 1923, Volume 1, page 26:

> "The books of a bankrupt, his schedules, inventory, and appraisement are competent evidence upon the question of insolvency."

Upon principle it is submitted that filed schedules in bankruptcy should be received as some evidence on the issue. The court is mindful of the penalties which a bankrupt must suffer if the schedules are false, namely, that a false oath thereto will deprive the bankrupt of his discharge privilege (National Bankruptcy Act, §14b (1), 11 U. S. C. A., Sec. 32) and will also make him punishable by imprisonment (National Bankruptcy Act, §29b (2), 11 U. S. C. A., Sec. 52).

However, upon the facts of this case petitioners cannot complain because the bankrupt testified as to their accuracy and an opportunity was afforded the defendant to cross-examine and develop that the schedules were false and inaccurate, and also had access to the books of account to indicate a contrary state of facts.

POINT II.

Assuming *arguendo* that petitioners were entitled to a trial by jury, such privilege may be and was upon the facts of this case effectively waived.

At the outset we deem it necessary to make mention of an error which appears in petitioners' brief at page 26 with respect to the facts of *Allen* v. *Gray,* 201 N. Y. 504. The petitioners cite this case for the following proposition, quoting from their brief (p. 26):

> "At the opening of the trial, *defendant* de-

manded a jury trial which was denied. The Court of Appeals reversed a judgment for the trustee *on the ground that defendant was entitled to a jury trial.*" (Italics ours.)

Reference to the case discloses that the demand for a jury trial was made by the *plaintiff* and not by defendant as is stated by petitioners.

We quote from *Allen* v. *Gray,* 201 N. Y. 504, at page 505:

> "The case was noticed for trial upon the calendar for jury trials, but upon the defendants' motion was transferred to the Special Term calendar. It was thereafter brought on for trial before the court without a jury. At the opening of the trial *the plaintiff demanded a jury trial,* which was refused, and an exception was taken to the refusal." (Italics ours.)

In the case at bar with laudable ingenuity but questionable good faith *at the opening of the trial* and at frequent intervals during its progress the petitioners made the following formal motions all of which were denied:

1. For an adjournment because of the alleged illness of petitioner, Fannie R. Schoenthal (fols. 57-68, 71, 2; 213).

2. For a jury trial (fols. 68-69, 193).

3. For a severance of the actions because of alleged misjoinder of parties (fols. 69-71).

The denial of the second of these motions is assigned as ground for review by this Court and discussed by petitioners in 18 pages of their brief (pp. 9-27).

Issue was joined in the action at bar, in October, 1930 (fol. 27) and under the rules of the District Court was granted a preference because the plaintiff is a trustee in bankruptcy (fols. 67, 72). The action appeared on the call calendar in February thereafter and was marked ready, and although the defendant's illness allegedly "has existed for nearly a year and still exists at the present time", no notice was given plaintiff, or any attempt made to take a deposition (fols. 64, 72, 219), nor any claim made in defendants' answer for a jury trial:

> "The Court: * * * counsel has not shown proper diligence in getting the woman's testimony or her deposition. *I cannot help be impressed but there is a very studied effort being made here to postpone the case*" (fol. 64). * * *
>
> "That is the impression I have gained from having heard two or three motions, at various times, since I have been sitting in this court, all of them with the idea of postponing the final hearing on this action" (fol. 67).

The above comment is equally applicable to the next motion which involved a demand for a jury trial. Assuming this application had merit, made returnable when the plaintiff was in court with witnesses prepared for trial, and no objection being raised in defendants' answer (fols. 26, 29), the motion was properly denied on the following authorities on the ground that the defendants by their acts had waived their right, if any existed, to object.

> *Adams* v. *Clarke* (C. C. A. 9th) 22 F. (2d) 957, at page 958:
>
> "But however that may be, defendants did not present to the lower court their request for a

transfer to the law side *until after the cause was actually called for trial* upon the equity calendar, and we think they thus waived such right, if any, as they may have had."

For an extended review of the authorities on the above proposition, see *Rosenthal* v. *Heller* (D. C. M. D., Penn.) 266 Fed. 563, relying upon decisions of this Court below noted:

> "To accomplish what plaintiff is here attempting could no doubt be accomplished by an action at law, and where such remedy is afforded a suit in equity will not be sustained, *unless waived by the parties.* The provisions of Section 723 of the Revised Statutes of the United States (Comp. St. §1244), that suits in equity shall not be sustained in the courts of the United States where there is an adequate remedy at law, was enacted to secure a privilege to a defendant *which he may waive* (*Warmath* v. *O'Daniel,* 159 Fed. 87, 20 Am. Bankr. Rep. 101), either by actual consent (*Hicks* v. *Knost,* 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183), *or by acquiescence.* See *Hollins* v. *Brierfield Coal & Coke Co.,* 150 U. S. 371, 380, 381, 14 Sup. Ct. 127, 37 L. Ed. 1113; and *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530, 536, 10 Sup. Ct. 604, 606 (33 L. Ed. 1021) where it was said by Justice Brewer:
>
> "* * * If the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it; and in a note (in 1 Dan. Ch. Prac. [4th Am. Ed.] p. 550) many cases are cited to establish that *"if a defend-*

> *ant in a suit in equity answers* and submits to the jurisdiction of the court, *it is too late for him to object* that the plaintiff had a plain and adequate remedy at law. This objection should be taken at the earliest opportunity.'"
>
> The defendants having entered their defense upon the merits at large, *they have waived their right to a trial at law,* and their motion to dismiss will be denied."

For a more recent holding that the objection may be waived, see *Duignan* v. *U. S.,* 274 U. S. 195, and *Henrietta Mills* v. *Rutherford County* (1929), 281 U. S. 121, 128, relying on *Singer Sewing Mach. Co.* v. *Benedict,* 229 U. S. 481, and *Reynes* v. *Dumont,* 130 U. S. 354, 395.

Preference actions have been tried in equity in the Second Circuit for 25 years on the authority of *Parker* v. *Black,* 151 Fed. 18 and *Parker* v. *Sherman,* 212 Fed. 917, Lacombe, *J.*

This Court has thus far refused to pass on the question. See *Adams* v. *Jones,* 11 F. (2d) 759, certiorari denied 271 U. S. 685 (1926). Certainly on the facts at bar no reason appears at this time for an examination into the question.

The existing rule moreover should not be disturbed, since the trial of preference actions by juries would needlessly delay and add to the cost of bankruptcy administration, by prolonging trials, and would unnecessarily encumber the already heavily burdened civil jury trial calendars.

Not long after the enactment of the Bankruptcy Act of 1898, Holt, *J.,* regarded as the "Father of the Bank-

ruptcy Act", sitting in the Southern District of New York, made the following holding in 1903, relating to the precise issue at bar:

Pond v. *New York National Exchange Bank,* 124 Fed. 992 (S. D. N. Y.), at page 992:

"This is a demurrer to a bill in equity filed to recover $16,000, paid by the bankrupt to the defendant, on the ground that it constituted a preference, prohibited by the bankruptcy act. * * * The only * * * grounds which require any consideration * * * are that the complainant has an adequate remedy at law. * * *"

At page 993:

"Under this section it is well settled that it is not enough that there is a remedy at law, it must be plain, adequate and complete; that is, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce* v. *Grundy,* 3 Pet. 213, 7 L. Ed. 655; *Thompson* v. *Allen Co.,* 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472.

This suit is analogous to a judgment creditor's suit to set aside a fraudulent conveyance. The original payment, when made, was valid. It would not have been voidable by the bankrupt. It has only become voidable at the election of the trustee in bankruptcy, in the same manner as a fraudulent conveyance may be set aside by a judgment creditor. The jurisdiction in such cases has always been in equity. Many such suits in equity were brought by trustees in bankruptcy under the act of 1867; for instance, *Grant* v. *Natl. Bank,* 97 U. S. 80, 24 L. Ed. 971; *Rogers* v. *Palmer,* 102 U. S. 263,

26 L. Ed. 164; *Stucky* v. *Masonic Savings Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640. Under the present act, it has been held that a suit in equity is the proper remedy. *Wall* v. *Cox*, 101 Fed. 403, 41 C. C. A. 408. This was one of the cases which held that the district court had jurisdiction of such suits under the original act, before the decision of the United States Supreme Court in *Bardes* v. *Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, which established the contrary rule; but the portion of the opinion which relates to the question whether such a suit shall be brought in equity or at law is entirely applicable to cases arising under the amended act.

My conclusion is that the demurrer should be overruled, with leave to the defendant to answer upon payment of costs."

POINT III.

Equity jurisdiction was properly invoked in this case in order to prevent multiplicity of suits.

This suit was commenced on preference causes of action identical except for amounts and dates of transfer against three separate defendants as follows:

Fannie R. Schoenthal (fol. 19)	$1,000
Morris Schoenthal (fol. 15)	500
Hyman Smith (fol. 21)	800

Only the first two were served. They appeared and filed separate answers, making no claim at the time of a misjoinder of parties or that the bill was not cognizable in equity (fols. 26, 29).

The petitioners in this Court claim no error on account of misjoinder of parties, and thereby concede that

these parties were all properly joined in this suit. By answering to the merits without protest, the defendants cannot in any event be heard to claim a misjoinder. (See *Barney* v. *Latham,* 103 U. S. 205, 215).

It is obvious that the actions involved common issues of law and fact, both from the record and petitioners' brief, and that, therefore, the defendants were properly joined in the action to prevent multiplicity of suits and to promote the convenience of witnesses pursuant to Rule 26 of the Equity Rules of this Court. (See *Marcus Brown Holding Co.* v. *Feldman,* 269 Fed. 306, 309, and *Jones* v. *Slauson,* 33 Fed. 632, 633.)

It appears, therefore, that the plaintiff's remedy at law was not "plain, adequate and complete" as contended. By virtue of the joinder of parties on causes of action which involved relatively small amounts, all of these issues were thereby disposed of in one trial.

A community of interest in the questions of law and fact involved in this controversy is sufficient to justify the exercise of equity jurisdiction to prevent a multiplicity of suits.

Commodores Point Terminal Co. v. *Hudnal* (D. C. Fla. 1922), 283 Fed. 150.

To the same effect see

Macmillan v. *Anderson* (D. C. Iowa, 1922), 282 Fed. 675.

This Court has held that equity jurisdiction will be sustained when a multiplicity of suits will be saved.

Oelreichs v. *Spain* (Dist. Col. 1872), 15 Wall. 211, and

Reynes v. *Dumont,* 130 U. S. 354.

CONCLUSION.

It is respectfully submitted that the petitioners have shown no reason in law or in fact which would justify this Court in granting their petition for certiorari in this case, and therefore, the petition should be dismissed.

Dated, March 25th, 1932.

Respectfully submitted,

SAUL J. LANCE,
Attorney for Respondent,
Irving Trust Co., as Trustee in Bankruptcy of Leonard H. Smith, trading as Faultless Sweater Mills, bankrupt,
27 Cedar Street,
New York, N. Y.

GEORGE C. LEVIN,
Of Counsel.

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OCT 12 1932

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER, 1932 TERM.

No. 14.

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,

Petitioners,

—against—

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,

Respondent.

RESPONDENT'S BRIEF.

GEORGE C. LEVIN,
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THE COURT PRESS, INC.

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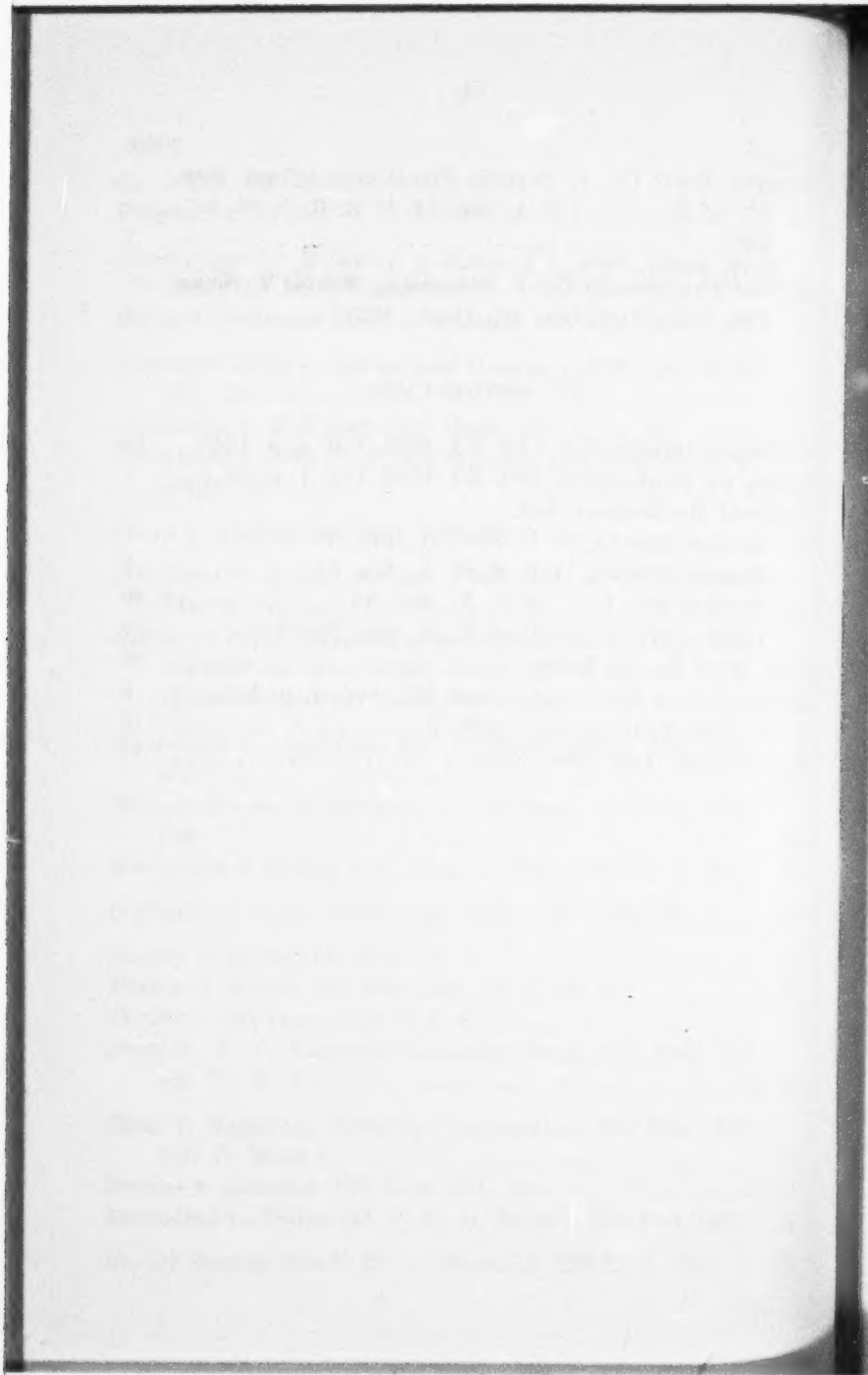

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—against—

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Respondent.

RESPONDENT'S BRIEF.

Statement.

The points in issue involved in this appeal are twofold:

1. Upon the particular facts of this case did the reception in evidence of the bankrupt's schedules in bankruptcy constitute reversible error?

2. Upon those facts, were the defendants wrongfully deprived of a jury trial?

Petitioners, relatives of the bankrupt, Leonard H. Smith, are declared by the judgment under appeal to

have obtained voidable preferences under §60b* of the National Bankruptcy Act (11 U. S. C. A., Sec. 96) in the aggregate amount of $1,500 (R. 65, 66).

Pursuant to recent amendment to the Equity Rules of this Court, the Trial Judge made separate findings of fact and conclusions of law on all of the issues in the case (R. 64-66).

The disposition below was affirmed by the Circuit Court without opinion (54 F. (2d) 1079) by Manton, L. Hand, and Chase, *JJ.*

Bearing on the introduction of evidence of the schedules in bankruptcy, the opinion of the Trial Judge indicates that the insolvency of the bankrupt was abundantly established (quoting only the relevant portions, R. 57, 58):

> "Briefly, the testimony discloses all the parties are related, that is to say, Morris Schoenthal and Fannie Schoenthal, brother and sister, are cousins of the bankrupt.
>
> The bankrupt testified that in June, 1930, he did not know how he stood financially, but early in that month hired a public accountant to investigate his business, paying him $100 for so doing. What his report discloses is not in evidence, but very shortly thereafter he offered his creditors twenty-five cents on the dollar * * *.
>
> Coming down to June, 1930, the month previous to the filing of the involuntary petition the

* "§60. *Preferred Creditors.*—b. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, *it shall be voidable by the trustee* and he may recover the property or its value from such person."

bankrupt testified he went to defendants for more funds. He was refused and was met with a demand for payment of moneys already due.

Beginning June 9, 1930, a short time after he had been informed by the public accountant of the state of his business, he began making the payments to the Schoenthals, which the Trustee here seeks to recover. During that month and previous to the filing of the petition, he paid his relatives in all $2,300, most of it to the defendants Morris and Fannie Schoenthal. During this particular month all his sales were, with few exceptions, for cash or C. O. D.; he further states he had no cash resources and that he knew he was insolvent."

During the course of trial and at various stages thereof the petitioners in order to procure an adjournment made various motions, the denial of one of which is here assigned as error. The sincerity of these applications was commented upon as follows by the Trial Court (R. 14, fol. 22):

"I cannot help be impressed, but there is a very studied effort being made here to postpone the case. * * *.

That is the impression I have gained from having heard two or three different motions *at various times**, since I have been sitting in this Court, all of them with the idea of postponing the final hearing on this action. Counsel must realize a bankruptcy preference suit, like these are, involves a preference and counsel should guide themselves accordingly" (R. 15).

* Italics throughout this brief, unless otherwise indicated, are the writer's.

POINT I.

The schedules in bankruptcy were properly received in evidence since the bankrupt took the witness stand, and if improperly received, merely constituted cumulative proof on the question of insolvency upon which petitioners offered no contradictory evidence.

The schedules in bankruptcy were received in evidence as bearing on the question of insolvency, it being incumbent upon the Trustee to establish this fact on the date of each transfer in suit. The preferential transfers were all made within the last month of the bankrupt's business existence, on June 9th, 11th and 19th, 1930.

Petitioners assert that the admission in evidence of the schedules constituted reversible error. The bankrupt was examined as a witness and testified that the schedules were correct (R. 29):

> "Q100. In June, 1930, what were your liabilities? A. This I couldn't tell you. You have a record there.
>
> Q101. You signed and swore to the schedules in bankruptcy in this case, did you not? A. Yes.
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> Q102. Are your schedules correct? A. Positively.
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> Q103. I call your attention to the fact that your schedules list liabilities totaling $18,900.26? A. That is correct."

The petitioners were not deprived of the opportunity of cross examination. Furthermore the trustee had available in court the bankrupt's books of account (R. 38). The petitioners were at liberty to employ these books if it was their contention that they establish that the bankrupt suddenly became insolvent.

The involuntary petition in this case was filed July 10th, 1930 (R. 3). All of the transfers in suit were made within a month prior to the petition. The bankrupt testified that when the end came, he had a bank balance of $250.11 (R. 30, 60) available for liabilities of $18,900.26 (R. 29).

There remained however fixed assets of the scheduled value of $15,953.88 which *included* the following: an unliquidated claim of $1,026.73 (R. 60) representing a salesman's overdrawals, and regarded as uncollectible (R. 30); a merchandise inventory of $3,624.88 (R. 60) which had depreciated (R. 22, 29, 30); and a fixed item of machinery and fixtures stated at $9,282.15, half of which was "three or four years old" and had depreciated in value (R. 30). From the above it was contended that the scheduled value was at least more than 50% of the actual value.

As against liabilities of $18,900.26, the trustee's balance available for creditors realized from all sources is $5,097.10 (R. 59).

The bankrupt testified that in the month of June business was dull, that he had very little cash on hand, and had a number of past due bills (R. 26).

In view of the foregoing, it is clear that no extraordinary improvement or substantial change was taking place in the bankrupt's financial affairs during the month of June to rebut the presumption that the bankrupt admittedly insolvent on the petition date was in the same condition the month preceding. Significantly the petitioners offered no contrary proof.

Wilmot Engineering Co. v. *Blanchard*, 203 N. Y. Supp. 700, 703 (App. Div. 4th Dept., 1924), quoting from the opinion of present Court of Appeals Judge Henry T. Kellogg:

"It does not appear that its insolvency came

about through some untoward happening within the 19 days. *Therefore, if it was insolvent on the 3d day of December, 1921, it was presumptively insolvent on the 14th day of November, 1921.*"

To the same effect see *In re Dix*, 267 Fed. 1016 (D. C. N. Y.), decided by Learned Hand, *C. J.*, while sitting as District Judge in the Northern District, holding that where insolvency is undisputed at the time of bankruptcy, it is *prima facie* proof of insolvency a month prior thereto.

Petitioners cite numerous authorities relative to the admissibility of schedules, in some of which the bankrupt did not take the witness stand. *Grant* v. *National Bank of Auburn*, 197 Fed. 581 (see Brief, p. 21) arose on a demurrer to the complaint before trial and is, therefore, distinguishable since the bankrupt was a witness in the instant case.

The trial court found that insolvency was clearly established (R. 58, fol. 76):

> "Insolvency has been shown. The fact that shortly after the payments were made the bankrupt offered 25 per cent. to his creditors is sufficient on that question. It is an admission that his assets equaled 25 per cent. of his liabilities."

It is submitted that the Trustee need not in every case burden the estate with the expense of engaging an accountant to interpret the books and records particularly where the insolvency alleged is so close to the petition. Moreover, as has been recognized, schedules are competent proof on the question of financial condition.

> "Upon this question (insolvency) it is proper to consider the condition of the bankrupt's estate as disclosed by the schedules in bankruptcy."

Lyttle v. *Fifth National Bank*, 39 A. B. R. 690, 693, affirmed by the circuit court, 250 Fed. 361, Rogers, *C. J.* (*certiorari* denied, 267 U. S. 506);

Collier on Bankruptcy, 13th Edition, 1923, Volume 1, page 26:

"The books of a bankrupt, *his schedules*, inventory, and appraisement are competent evidence upon the question of insolvency."

Upon principle it is submitted that filed schedules in bankruptcy should be received as some evidence on the issue. The court is mindful of the penalties which a bankrupt must suffer if the schedules are false, namely, that a false oath thereto will deprive the bankrupt of his discharge privilege (National Bankruptcy Act, §14b (1), 11 U. S. C. A., Sec. 32) and will also make him punishable by imprisonment (National Bankruptcy Act, §29b (2), 11 U. S. C. A., Sec. 52).

However, upon the facts of this case petitioners cannot complain because the bankrupt testified as to the accuracy of the schedules and an opportunity was afforded the defendants to cross-examine and develop that the schedules were false and inaccurate, and they also had access to the books of account to indicate a contrary state of facts, to establish which, no attempt was made.

Trenton Trust Co. v. *Carlise Fire Corp.* (Conn. Sup. Ct. of Errors), 147 A. 366, 14 A. B. R. N. S. 645, 648:

"The schedules in bankruptcy were admitted in evidence, apparently for the purpose of showing the amount of the liabilities of the defendant; but any error in that regard was obviated by the fact from the books of the company in evidence and other testimony liabilities to a greater amount

than those scheduled had already been shown, and the further fact that those appearing upon the books alone were in excess of the total value of the assets of the company as found by the court, so that we cannot regard the ruling as harmful."

Petitioners at page 21 stress the comment of Remington on the admissibility of schedules. That authority it is interesting to observe, however, lists a number of cases (Remington on Bankruptcy, 3rd ed., Vol. 4, page 517 as approving their reception in evidence (see §1755, footnote 18).

POINT II.

Assuming *arguendo* that petitioners were entitled to a trial by jury, such privilege may be and was upon the facts of this case effectively waived.

At the outset we deem it necessary to make mention of an error which appears in petitioner's brief in support of petition for certiorari at page 26 with respect to the facts of *Allen* v. *Gray,* 201 N. Y. 504. The petitioners cite this case for the following proposition, quoting from that brief (p. 26):

> "At the opening of the trial, *defendant* demanded a jury trial which was denied. The Court of Appeals reversed a judgment for the trustee *on the ground that defendant was entitled to a jury trial.*" (Italics ours.)

Reference to the case discloses that the demand for a jury trial was made by the *plaintiff* and not by defendant as is stated by petitioners.

We quote from *Allen* v. *Gray,* 201 N. Y. 504, at page 505:

> "The case was noticed for trial upon the calen-

dar for jury trials, but upon the defendants' motion was transferred to the Special Term calendar. It was thereafter brought on for trial before the court without a jury. At the opening of the trial the *plaintiff demanded a jury trial,* which was refused, and an exception was taken to the refusal."

In the case at bar with laudable ingenuity but questionable good faith *at the opening of the trial* and at frequent intervals during its progress the petitioners made the following formal motions all of which were denied:

1. For an adjournment because of the alleged illness of petitioner, Fannie R. Schoenthal (R. 12-15, 55).

2. For a jury trial (R. 15, 50).

3. For a severance of the actions because of alleged misjoinder of parties (R. 15, 16).

The denial of only the second of these motions is assigned as ground for review by this Court.

Issue was joined in the action at bar, in October, 1930 (R. 6) and under the rules of the District Court, in order to expedite the administration of bankrupt estates, was granted a preference because the plaintiff is a trustee in bankruptcy (R. 15, 16). The action appeared on the call calendar a number of times in February thereafter and was marked ready, and although one of the defendant's illness allegedly "has existed for nearly a year and still exists at the present time", no notice was given plaintiff, or any attempt made to take a deposition (R. 15, 55), nor was any claim made in defendant's answer for a jury trial:

"The Court: * * * counsel has not shown proper

diligence in getting the woman's testimony or her deposition. *I cannot help be impressed but there is a very studied effort being made here to postpone the case*" (R. 14). * * *

"That is the impression I have gained from having heard two or three motions, at various times, since I have been sitting in this court, all of them with the idea of postponing the final hearing on this action" (R. 14, 15).

The Trustee's position was thus stated to the District Court (R. 13):

"We are compelled to rely in these cases upon hostile witnesses and we have been met at point of trial with a motion to adjourn the action and a transfer from the equity calendar to the law side. Now, there is a question of good faith here, whether all these tactics are being adopted for the purpose of delay or actually for the purpose which the application recites."

The trial court properly admonished counsel (R. 15):

"Counsel must realize a bankruptcy preference suit, like these are, involves a preference and counsel should guide themselves accordingly."

The above comment is equally applicable to the next motion which involved a demand for a jury trial. Assuming this application had merit, made returnable when the plaintiff was in court with witnesses prepared for trial and no objection being raised in defendant's answer, nor any claim made therein for a jury trial* (R. 6, 7),

* Not binding on this court, but indicative of the modern tendency is the legislative enactment declaring a jury trial waived unless promptly demanded. See N. Y. Civil Practice Act (Am'd L. 1927 ch. 696; L. 1929, ch. 196) §426, 5 * * * "If the plaintiff fails so to serve and file such notice demanding a jury trial * * * the action shall be placed on the calendar for the trial of actions without a jury, unless a jury trial *be demanded* (within twenty days) by another party to the action * * *."

the motion was properly denied on the following authorities on the ground that the defendants by their acts had waived their right, if any existed, to object.

> *Adams* v. *Clarke* (C. C. A. 9th) 22 F. (2d) 957, at page 958:
>
> "But however that may be, defendants did not present to the lower court their request for a transfer to the law side *until after the cause was actually called for trial* upon the equity calendar, and we think they thus waived such right, if any, as they may have had."

For an extended review of the authorities on the above proposition, see *Rosenthal* v. *Heller* (D. C. M. D., Penn.) 266 Fed. 563, relying upon decisions of this Court below noted:

> "To accomplish what plaintiff is here attempting could no doubt be accomplished by an action at law, and where such remedy is afforded a suit in equity will not be sustained, *unless waived by the parties.* The provisions of Section 723 of the Revised Statutes of the United States (Comp. St. §1244), that suits in equity shall not be sustained in the courts of the United States where there is an adequate remedy at law, was enacted to secure a privilege to a defendant *which he may waive* (*Warmath* v. *O'Daniel,* 159 Fed. 87, 20 Am. Bankr. Rep. 101), either by actual consent (*Hicks* v. *Knost,* 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183), *or by acquiescence.* See *Hollins* v. *Brierfield Coal & Coke Co.,* 150 U. S. 371, 380, 381, 14 Sup. Ct. 127, 37 L. Ed. 1113; and *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530, 536, 10 Sup. Ct. 604, 606 (33 L. Ed. 1021) where it was said by Justice Brewer:

> "* * * If the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it; and in a note (in 1 Dan. Ch. Prac. [4th Am. Ed.] p. 550) many cases are cited to establish that *"if a defendant in a suit in equity answers* and submits to the jurisdiction of the court, *it is too late for him to object* that the plaintiff had a plain and adequate remedy at law. This objection should be taken at the earliest opportunity".'
>
> The defendants having entered their defense upon the merits at large, *they have waived their right to a trial at law,* and their motion to dismiss will be denied."

For more recent holdings that the objection may be waived, see *Duignan* v. *U. S.,* 274 U. S. 195, and *Henrietta Mills* v. *Rutherford County* (1929), 281 U. S. 121, 128, relying on *Singer Sewing Mach. Co.* v. *Benedict,* 229 U. S. 481, and *Reynes* v. *Dumont,* 130 U. S. 354, 395.

POINT III.

A bankruptcy preference inherently involves an equitable remedy and should be heard in equity.

Preference actions have been tried in equity in the Second Circuit for 25 years on the authority of *Parker* v. *Black,* 151 Fed. 18 and *Parker* v. *Sherman,* 212 Fed. 917, Lacombe, *J.*

The existing rule it is submitted should not be disturbed, since the trial of preference actions by juries would needlessly delay and add to the cost of bankruptcy administration, by prolonging trials, and would unneces-

sarily encumber the already heavily burdened civil jury trial calendars.

The average preference action involves small amounts. According to available statistics in the bulk of bankruptcy cases, the liabilities are under $5,000. To adopt the rule contended for by petitioners would result in a flood of jury cases in the Southern District of New York, where bankruptcies are more prevalent than any other federal district. The only limitation in a district where calendar congestion on the jury side is already acute, would be that the amount in suit exceed $20.00.

Such a departure unwelcome for practical reasons is unnecessary on principle.

Not long after the enactment of the Bankruptcy Act of 1898, Holt, *J.*, regarded as the "Father of the Bankruptcy Act", sitting in the Southern District of New York, made the following holding in 1903, relating to the precise issue at bar:

Pond v. *New York National Exchange Bank*, 124 Fed. 992 (S. D. N. Y.), at page 992:

> "This is a demurrer to a bill in equity filed to recover $16,000, paid by the bankrupt to the defendant, on the ground that it constituted a preference, prohibited by the bankruptcy act. * * * The only * * * grounds which require any consideration * * * are that the complainant has an adequate remedy at law. * * *"

At page 993:

> "Under this section it is well settled that it is not enough that there is a remedy at law, it must be plain, adequate and complete; that is, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce* v. *Grundy*, 3 Pet. 213, 7 L. Ed. 655; *Thomp-*

son v. *Allen Co.,* 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472.

This suit is analogous to a judgment creditor's suit to set aside a fraudulent conveyance. The original payment, when made, was valid. It would not have been voidable by the bankrupt. It has only become voidable at the election of the trustee in bankruptcy, in the same manner as a fraudulent conveyance may be set aside by a judgment creditor. The jurisdiction in such cases has always been in equity. Many such suits in equity were brought by trustees in bankruptcy under the act of 1867; for instance, *Grant* v. *Natl. Bank,* 97 U. S. 80, 24 L. Ed. 971; *Rogers* v. *Palmer,* 102 U. S. 263, 26 L. Ed. 164; *Stucky* v. *Masonic Savings Bank,* 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640. Under the present act, it has been held that a suit in equity is the proper remedy. *Wall* v. *Cox,* 101 Fed. 403, 41 C. C. A. 408. This was one of the cases which held that the district court had jurisdiction of such suits under the original act, before the decision of the United States Supreme Court in *Bardes* v. *Bank,* 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, which established the contrary rule; but the portion of the opinion which relates to the question whether such a suit shall be brought in equity or at law is entirely applicable to cases arising under the amended act.

My conclusion is that the demurrer should be overruled, with leave to the defendant to answer upon payment of costs."

It is suggested by petitioners at page 14 of their brief, that

> "Every State Court which has passed on this question has held that the action must be tried at law."

In that connection the Court should examine the decision in *Houghton* v. *Stiner* (N. Y.), 92 App. Div. 171, 87 N. Y. Supp. 10, in which this particular State Court suggested the following:

> "* * * If we are to be controlled by the weight of precedent, we might multiply indefinitely the citation of cases brought in equity wherein relief such as is here sought was accorded. *Schreyer* v. *Citizens' Nat. Bank,* 74 App. Div. 478, 77 N. Y. Supp. 494; *Pearsall* v. *Nassau Nat. Bank,* 74 App. Div. 89, 77 N. Y. Supp. 11; *Bardes* v. *Hawarden Bank,* 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Jones* v. *Schermerhorn,* 53 App. Div. 494, 65 N. Y. Supp. 999; *Stackhouse* v. *Holden,* 66 App. Div. 423, 73 N. Y. Supp. 203; *Perry* v. *Booth,* 67 App. Div. 235, 73 N. Y. Supp. 216."

Recognizing in that case the conflict of authority on the question, Mr. Justice O'Brien made these observations which we submit on principle are controlling (87 N. Y. Supp. at p. 11):

> "* * * Aside, however, from precedents or cases, we think that, *were this an original proposition, the right to maintain in equity such an action as this can be sustained by good and sufficient reasons.* The transfer made by the debtor to the creditor was entirely valid when made, and the title to the property passed to the creditor, together with the right to possession. We do not understand that an action at law could be maintained in trover or replevin by one *who neither had the title to the property nor the right to possession.* It is true that where the trustee elects to avoid the transfer because giving a preference he is entitled to recover the property which has been transferred or its value; but this is quite distinct and different from divesting the creditor of the title and right to possession by the fact

merely that the trustee in bankruptcy elects to rescind the transaction. When such election is signified either by demand or the bringing of an action in equity for an accounting, the creditor then stands in the position of one who holds the title and the right of possession to the property, or its value if sold, as quasi trustee for all the creditors, and as such he can be compelled to account in equity to the one entitled on behalf of the creditors to the property."

At page 12 the Court continued:

"We are not unmindful of the fact that there is no element of fraud in this form of action, and that the theory upon which relief is accorded is, not that the creditor has done anything wrongful in obtaining payment for his debt, because that he could legally do, *but the right is given to the trustee in bankruptcy by statute to set aside such payment* for the purpose of preventing a preference to any particular creditor within four months of the adjudication in bankruptcy. Apart, however, from the question of fraud, thinking, as we do, that *the trustee* with respect to property so transferred to a creditor *is not, by the mere force of his appointment,* invested with the legal title or the right to possession of the property, but that he is permitted in the proper action to regard the transfer *as voidable* at his election, it follows, we think, that the mere fact of electing does not destroy the rules affecting title, ownership, or possession; and as under them the title and right to possession is in the creditor until such time as he either voluntarily surrenders the same to the trustee in bankruptcy or is deprived thereof by a valid adjudication the trustee in bankruptcy is not, at the outset or the beginning of an action, in a position to maintain an action at law either in trover or in replevin. If neither of these

> actions will lie—and they are the only ones at law that can be suggested—then seemingly the remedy of the trustee would be in equity."

Like comment was made by District Judge Lowell in *Reed* v. *Guaranty Security Corporation*, 291 Fed. 580 (D. C. Mass.), the Court holding at page 581:

> "• • • The rule which prevails in this circuit seems to me to be supported by the better reasoning. Bankruptcy is equitable in its nature. *A preference is a creature of the bankruptcy statute, and was unknown to the common law.* It is a technical fraud, and was developed by the equity judges of England (Lowell, Bankruptcy, p. 42 *et seq.*), and did not appear in any statute there until 1869 (id., p. 44)."

This Court has itself on numerous occasions commented upon the equitable features of the Bankruptcy Act, of which the decision by Chief Justice Taft in *Cunningham* v. *Brown*, 265 U. S. 1, is illustrative, this Court commenting (265 U. S. 13) in that preference suit:

> "It is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankruptcy law."

At page 4 petitioners suggest "that the principles heretofore enunciated by this Court • • • compel the conclusion that equity has no jurisdiction of such actions. • • •"

It is significant that this Court in a number of instances involving preferences of definite sums of money has on appeal directed the entry of equitable decrees.

See *Cunningham* v. *Brown*, cited *supra*, decided in 1924. Discussing th famous *Ponzi* cases, this Court held (265 U. S. at p. 7):

> "Mr. Justice Taft delivered the opinion of the Court.

> These were six suits *in equity*, brought by the trustees in bankruptcy of Charles Ponzi to recover of the defendants *sums* paid them by the bankrupt within four months prior to the filing of the petition in bankruptcy, on the ground that they were *unlawful preferences.* • • • The actions were tried together in the district court, and were argued together in the Circuit Court of Appeals, and the bills were *dismissed* in both courts • • • (p. 13). It is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankruptcy law. Those who were successful in the race of diligence violated not only the spirit, but its letter, and secured an *unlawful preference.* A minor is not exempt (14) from the defeat of an unlawful preference by §*60b* of the Bankruptcy Act, as amended.
>
> The decrees are *reversed.*"

It is of course the fact that in the *Ponzi* cases the right of the plaintiff to proceed in equity was not questioned; however, if petitioners' argument (pp. 4-7) is accepted the defendants' rights to a jury trial have been violated by this Court.

For similar instances in which this Court has approved the entry of equitable decrees declaring unlawful preferences, where a money judgment would suffice see *Hotchkiss* v. *National City Bank*, 231 U. S. 50, and *Mechanics & Metals Nat. Bank* v. *Ernst*, 231 U. S. 60.

The proof in a preference action is highly technical, involving frequently difficult questions of set-off, book proof of insolvency, testimony by expert accountants, witnesses hostile to the trustee, and other features rendering difficult the presentation of the issue in a jury trial. Before the trustee can prevail he must establish a number of statutory re-

quirements, the absence of any one of which vitiates his cause of action.

Collier, 13th ed., Vol. 2, page 1248:

> "* * * Since these amendments a preference consists in a person (1) while insolvent and (2) within four months of the bankruptcy, (3) procuring or suffering a judgment to be entered against himself or making a transfer of his property, (4) the effect of which will be to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class. Such a preference is voidable at the instance of the trustee, if (5) the person receiving it or to be benefited thereby has (6) reasonable cause to believe that the enforcement of the judgment or transfer will result in a preference. If any of these elements is wanting, a preference cannot be set aside if otherwise valid under the State law. The burden of proving the existence of the essential elements of a transfer is upon the trustee seeking to avoid it. The practitioner should always have in mind that, under the present law, many transfers are preferences in name but not in fact. To be the latter, the remedy prescribed in subsection b must at least be available. The transfers must, in short, be voidable."

Petitioners at page 15 rely strongly upon *Lewinson* v. *Hobart Service Trust Co.*, 49 F. (2d) 356 (D. C. N. J.) and the English cases therein referred to. The *Lewinson* case and the problem here involved has been recently commented upon in the Columbia Law Review (1931). Discussing that case, it is cogently suggested (31 Columbia Law Rev. 1356):

> "* * * Yet the usual complexity of modern bankruptcy proceedings would seem better adapted to

> a trial in equity, with its special devices for ascertaining the merits of a complicated case, than to one at law. The strongest argument in favor of denying the federal equity jurisdiction, that the express terms of the Judicial Code forbid it, begs the question, for the real issue is whether the remedy at law is in fact adequate."

It is submitted that the language of Judge Holt in *Pond* v. *N. Y. National Exchange Bank* (*supra*) is decisive:

> "That it is not enough that there is a remedy at law, it must be plain, adequate and complete; that is as practical and efficient to the ends of justice and its prompt administration as a remedy in equity"

citing decisions of this Court.

The Bankruptcy Act itself defines a preference as *voidable,* and not void. The transfer stands until declared in violation of the statute; after fixing the elements of a preference the statute declares (§60b):

> "It shall be *voidable* by the Trustee."

The English cases strongly relied on by petitioner, add little to the discussion in view of the language of the statute. Practically all of the cases cited were decided prior to the amendment of 1910 to the Bankruptcy Act, which enlarges the Trustee's rights. The Bankruptcy Act now provides (§47-A-2):

> "* * * and such trustees * * * as to all property not in the custody of the Bankruptcy Court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. * * *"

Judge Holt in 1903 referring to an action to recover a preference held:

> "This suit is analogous to a judgment creditor's suit to set aside a fraudulent conveyance."

In 1910 his views were embodied in statute form to arm the trustee with the "powers of a judgment creditor holding an execution duly returned unsatisfied".

For an extended review of authorities approving of the bringing of a preference suit in equity see *Goodenough* v. *Milliken* (D. C. Me. 1871), 1 Hask. 348, Fed. Cases No. 5535, holding that there are numerous instances in which equity has concurrent jurisdiction. District Judge Fox, reviewing a long list of cases, held (10 Fed. Cas. 593):

> "The allegations in the present bill being, that the rights as set up to the fund or property by the respondents were acquired by them in fraud of the bankrupt act, and the court being called upon by the assignee to so determine, and thereupon to declare them null and void, the case, as I think, is brought within that comprehensive branch of equity jurisdiction of setting aside and vacating conveyances made by a debtor in fraud of his creditors. In such cases, courts of equity grant relief upon the ground of fraud established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law. Story, Eq. Jur. §190. So far as I am advised, the practice of the district courts of the United States in matters of this nature arising under the present bankrupt act has been in conformity with these views."

Judge Hazel in 1906 in *Parker* v. *Black*, 143 Fed. 560 (D. C. N. Y.) likewise made a review of the authorities

and discussed them concluding that the remedy in equity was permissible (p. 561):

> "In Loveland on Bankruptcy (2nd Ed.), p. 608, the practice is thus stated:
>
> > 'To recover property conveyed by the bankrupt in fraud of the act, either as a preference or a fraudulent conveyance, is not a proceeding in bankruptcy. It must be a plenary suit at law or in equity, according to the nature of the case. Such suits may be actions at law, in ejectment, trover, assumpsit, etc., or suits in equity, as a bill to set aside a fraudulent conveyance.'
>
> In *Bardes* v. *Bank,* 178 U. S. 524, the Supreme Court of the United States, specifically answering the question of jurisdiction certified to them, says:
>
> > 'The provisions of the second clause of section 23 of the bankrupt act of 1898 (30 Stat. 552; U. S. Comp. St. 1901, p. 431) control and limit the jurisdiction of all courts, including several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent against creditors, including payments in money or property to preferred creditors.'
>
> It will be noted that the language employed in the same sentence includes suits to set aside fraudulent conveyances and suits for the recovery of money paid by the bankrupt to third persons. This would seem to indicate that the Supreme Court regarded the payment of money to a creditor or third person in violation of the bankruptcy act as in the nature of a fraud, misrepresentation, or concealment, and that a remedy in equity would more readily afford adequate relief. *Jones* v. *Bolles,* 9 Wall. 364, 19 L. Ed. 734."

POINT IV.

Equity jurisdiction was properly invoked in this case in order to prevent multiplicity of suits.

This suit was commenced on preference causes of action identical except for amounts and dates of transfer against three separate defendants as follows:

Fannie R. Schoenthal (R. 4)	$1,000
Morris Schoenthal (R. 5)	500
Hyman Smith (R. 5)	800

Only the first two were served. They appeared and filed separate answers, making no claim at the time of a misjoinder of parties or that the bill was not cognizable in equity (R. 6, 7). Nor was any demand made at the time for a trial by jury.

The petitioners in this Court claim no error on account of misjoinder of parties, and thereby concede that these parties were all properly joined in this suit. By answering to the merits without protest, the defendants cannot in any event be heard to claim a misjoinder. (See *Barney* v. *Latham,* 103 U. S. 205, 215).

It is obvious that the actions involved common issues of law and fact, both from the record and petitioners' brief, and that, therefore, the defendants were properly joined in the action to prevent multiplicity of suits and to promote the convenience of witnesses pursuant to Rule 26 of the Equity Rules of this Court. (See *Marcus Brown Holding Co.* v. *Feldman,* 269 Fed. 306, 309, and *Jones* v. *Slauson,* 33 Fed. 632, 633.)

It appears, therefore, that the plaintiff's remedy at law was not "plain, adequate and complete" as contended. By virtue of the joinder of parties upon causes of action

which involved relatively small amounts, all of these issues were thereby disposed of in one trial.

A community of interest in the questions of law and fact involved in this controversy is sufficient to justify the exercise of equity jurisdiction to prevent a multiplicity of suits.

> *Commodores Point Terminal Co.* v. *Hudnal* (D. C. Fla. 1922), 283 Fed. 150.

To the same effect see

> *Macmillan* v. *Anderson* (D. C. Iowa, 1922), 282 Fed. 675.

This Court has held that equity jurisdiction will be sustained when a multiplicity of suits will be saved.

> *Oelreichs* v. *Spain* (Dist. Col. 1872), 15 Wall. 211, and
> *Reynes* v. *Dumont*, 130 U. S. 354.

It is submitted that on the facts of this case, no justification appears for burdening the trustee with the hardship and expense of commencing over again at law in three separate suits, issues involving jointly only $2300.

CONCLUSION.

It is respectfully submitted that the petitioners have shown no reason in law or in fact which would justify this Court in disturbing the decisions below.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1932.

Morris Schoenthal and Fannie R. Schoenthal, Petitioners, *vs.* Irving Trust Co., as Trustee in Bankruptcy of Leonard H. Smith.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 7, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

This is a suit in equity brought by respondent in the district court for southern New York to recover from Morris Schoenthal $500 and from Fannie Schoenthal $1,000 paid them by the bankrupt. The bill alleged facts sufficient to show that each of these payments operated as a preference under § 60 b of the Bankruptcy Act, 11 U. S. C., § 96 b, asserted that plaintiff had no adequate remedy at law, and prayed decree declaring the payments preferential and directing defendants to account for and pay to plaintiff the amounts so received with interest and costs. October 27, 1930, defendants separately answered and put in issue all the allegations of the bill.

The case was advanced to the February, 1931, calendar. February 13, invoking Equity Rule 22, defendants, on petition and notice of motion to be heard four days later, applied for an order transferring the suit to the law side of the court and for a trial by jury. On the return day the application was referred to the judge sitting in equity and was taken up February 24. After hearing counsel, the court denied the motion and immediately proceeded to trial in equity. It heard evidence, filed findings of fact and conclusions of law and entered judgment that plaintiff recover from Morris Schoenthal $538.74 and from Fannie Schoenthal $1,075.84 and have executions therefor. The Circuit Court of Appeals affirmed.

The principal question is whether, assuming they made timely application under Rule 22, defendants were entitled to have the suit tried at law.

Section 267 of the Judicial Code provides: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law". 28 U. S. C., § 384. That rule has always been followed in courts of equity. The enactment gives it emphasis and indicates legislative purpose that it shall not be relaxed. *New York, etc. Co.* v. *Memphis Water Co.*, 107 U. S. 205, 214. *Matthews* v. *Rodgers*, 284 U. S. 521, 525. It serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed. Cf. *Ex parte Yerger*, 8 Wall. 85, 101-103. In England, long prior to the enactment of our first Judiciary Act, common law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts.[1] Suits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it. *Taylor* v. *Voss*, 271 U. S. 176, 182. They may be brought in the state courts as well as in the bankruptcy courts. *Collett* v. *Adams*, 249 U. S. 545, 549. The question whether remedy must be by action at law or may be pursued in equity notwithstanding objection by defendant depends upon the facts stated in the bill. And, in absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained. *Boyce's Executors* v. *Grundy*, 3 Pet. 210, 215. *Buzard* v. *Houston*, 119 U. S. 347, 352. *United States* v. *Bitter Root Co.*, 200 U. S. 451, 472. The facts here alleged give no support to plaintiff's assertion that it has no adequate remedy at law. The preferences sued for were money payments of ascertained and definite amounts. The bill discloses no facts that call for an accounting or other equitable relief. It is clear that there may be had at law "a remedy as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity". *Boyce's Executors* v. *Grundy, ubi supra.* The contention that § 267 prohibits the maintenance of this suit in equity is sustained

[1]Meggott *v.* Mills, 1 Ld. Raym. 286. Atkin *v.* Barwick, 1 Stra. 165. Alderson *v.* Temple, Burr. 2235. Harman *v.* Fishar, Cowp. 117. Rust *v.* Cooper, Cowp. 629. Thompson *v.* Freeman, 1 D. & E. 155. Barnes *v.* Freeland, 6 D. & E. 80. Smith *v.* Payne, 6 D. & E. 152. Nixon *v.* Jenkins, 2 H. Bl. 135. Marks *v.* Feldman, L. R. 5 Q. B. 275, 280-281. Cf. Ex parte Scudamore, 3 Ves. 85, 87. Farrow *v.* Mayes, 18 Q. B. 516.

in principle by numerous decisions of this court.[2] And upon the very question here presented the weight of judicial opinion in the lower federal courts[3] and in the state courts[4] is that suits such as this cannot be sustained in equity.

Plaintiff insists that defendants waived their right to have the suit transferred to the law side.

Rule 22 declares: "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential". As plaintiff's bill shows that it had a plain, adequate and complete remedy at law, defendants were entitled upon proper application to have the suit transferred and trial by jury. Undoubtedly they might have waived that right. *Reynes* v. *Dumont*, 130 U. S. 354, 395. *Amer. Mills Co.* v. *Amer. Surety Co.*, 260 U. S. 360, 363. But the record discloses no

[2]Hipp *v.* Babin, 19 How. 271, 279. Parker *v.* Winnipiseogee Lake Company, 2 Bl. 545, 550 et seq. Kennedy *v.* Gibson, 8 Wall. 498, 505. Insurance Company *v.* Bailey, 13 Wall. 616, 620-621. Grand Chute *v.* Winegar, 15 Wall. 373, 376. Lewis *v.* Cocks, 23 Wall. 466, 469. New York, etc. Co. *v.* Memphis Water Co., 107 U. S. 205, 214. Buzard *v.* Houston, 119 U. S. 347, 352-353. Whitehead *v.* Shattuck, 138 U. S. 146, 150-151. United States *v.* Bitter Root Co., 200 U. S. 451, 472.

[3]Warmath *v.* O'Daniel (C. C. A.-6, 1908) 159 Fed. 87, 90. Seasler *v.* Nemcof (E. D. Pa., 1910) 183 Fed. 656. Grant *v.* National Bank of Auburn (N. D. N. Y., 1912) 197 Fed. 581, 590. First State Bank *v.* Spencer (C. C. A.-8, 1915) 219 Fed. 503. Simpson *v.* Western Hardware & Metal Co. (W. D. Wash., 1915) 227 Fed. 304, 313. Edwards Co. *v.* La Dow (C. C. A.-6, 1916) 230 Fed. 378, 381. Turner *v.* Schaeffer (C. C. A.-6, 1918) 249 Fed. 654. Rosenthal *v.* Heller (M. D. Pa., 1920) 266 Fed. 563. Morris *v.* Neumann (C. C. A.-8, 1923) 293 Fed. 974, 978. Adams *v.* Jones (C. C. A.-5, 1926) 11 F. (2d) 759, certiorari denied, 271 U. S. 685. Lewinson *v.* Hobart Trust Co. (N. J., 1931) 49 F. (2d) 356. Gelinas *v.* Buffum (C. C. A.-9, 1931) 52 F. (2d) 598.

Contra: Pond *v.* New York National Exch. Bank (S. D. N. Y., 1903) 124 Fed. 992. Off *v.* Hakes (C. C. A.-7, 1905) 142 Fed. 364, 366. In re Plant (S. D. Ga., 1906) 148 Fed. 37. Parker *v.* Black (C. C. A.-2, 1907) 151 Fed. 18. Parker *v.* Sherman (C. C. A.-2, 1914) 212 Fed. 917, 918. Reed *v.* Guaranty Security Corporation (Mass., 1925) 291 Fed. 580.

[4]McCormick *v.* Page (1901) 96 Ill. App. 447. Detroit Trust Co. *v.* Old National Bank (1908) 155 Mich. 61, 64. Boonville Nat. Bank *v.* Blakey (1906) 166 Ind. 427, 442. Irons *v.* Bias (1920) 85 W. Va. 493. People's Bank *v.* McAleer (1920) 204 Ala. 101, 103.

act or omission of theirs at all inconsistent with their denial by answer of the assertion in the bill that plaintiff had no remedy at law or to suggest that they were willing that the case should be tried in equity. Their application was noticed to be heard about a week before the case was reached for trial. It is not shown that they delayed the hearing of the motion. Presumably the matter was referred to the judge sitting in equity to serve the convenience of the court. The rule directs the transfer if "at any time" it shall appear that the suit should have been brought as an action at law. An application for transfer brought on for hearing before the commencement of the trial is not too late. *Parkerson* v. *Borst*, 251 Fed. 242, 245. Plaintiff's claim that defendants waived their right under the rule is without merit.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.